IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1067

[redacted] LOS ANGELES COUNTY, a body corporate and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; FACILITIES DEPARTMENT OF LOS ANGELES COUNTY; CITY OF LOS ANGELES, a municipal corporation; LOS ANGELES CITY COUNCIL; DEPARTMENT OF RECREATION AND PARKS OF THE CITY OF LOS ANGELES; DEPARTMENT OF PUBLIC WORKS OF THE CITY OF LOS ANGELES,

Appellants,

vs.

ASSOCIATED GENERAL CONTRACTORS OF CALIFORNIA, a nonprofit corporation; ENGINEERING CONTRACTORS ASSOCIATION, a nonprofit corporation; AMERICAN SUBCONTRACTORS ASSOCIATION, a nonprofit corporation; LOS ANGELES COUNTY CHAPTER, NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC., a nonprofit corporation; STEVE P. RADOS, INC., a corporation; GRIFFITH COMPANY, a corporation; GORDON H. BALL, INC., a corporation; STODDARD ENTERPRISES, a sole proprietorship; and GRANITE CONSTRUCTION COMPANY, a corporation,

Appellees and Cross-Appellants.

Appeal From the United States District Court,
Central District of California.

JURISDICTIONAL STATEMENT.

(Names and Addresses of Attorneys on Inside Front Cover)

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Appellees and Cross-Appellants.

**Appeal From the United States District Court,
Central District of California.**

JURISDICTIONAL STATEMENT.

Opinion Below.

The United States District Court, Central District of California, on November 1, 1977, signed, and on November 2, 1977, filed, its decision and order, which is not yet reported. A copy of the decision and order is attached to this jurisdictional statement as Appendix A.

Jurisdiction.

The appeal herein is from a summary judgment decided on November 1, 1977, and filed and entered on November 2, 1977, by the United States District Court, Central District of California, which declared and determined that "Section 103(f)(2) of Public Law 95-28, 42 U.S.C. 6705(f)(2), and the rules and regulations issued thereunder and relating thereto, especially Section 317.19, 42 Fed.Reg. 27432 at 27434-5, are and each is in and of themselves and on their face and as applied here, unconstitutional under the United States Constitution, including the Fifth Amendment thereof as a denial of equal protection of the laws and as invidious and impermissible provisions for a race quota; and that the said statute and rules and regulations, and the race quota thereby mandated, are illegal, contrary to law and arbitrary, capricious and unreasonable, as violations of Title VI of the Federal Civil Rights Act of 1964, 42 U.S.C. 2000d and 2000d-1" and which permanently enjoined the appellants herein, and each of them, "from enforcing, applying, carrying out or implementing in any manner whatsoever, directly or indirectly, including the allocation or grant of Federal funds authorized in the future, the provisions of said Public Law 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2), and the said rules and

regulations issued thereunder, especially Section 317.19, 42 Fed.Reg. 27432 at 27434-5, from and after October 31, 1977". The injunction does "not govern or apply to Federal funds heretofore granted or to any actions" by the Appellants with respect to funds granted to the local Appellants (City and County of Los Angeles) prior to the date of the judgment.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and opinion complained of by the provisions of 28 U.S.C. Sec. 1252.

The following decision sustains the jurisdiction of the Supreme Court to review the judgment and opinion by direct appeal in this case. *Lucas v. DeChamplain*, 421 U.S. 21; 43 L.Ed.2d 699 (1975).

The provisions of the Act of Congress and the rules and regulations declared unconstitutional by the United States District Court, Central District of California, which are involved are:

Public Law 95-28, Sec. 103(f)(2); 42 U.S.C. 6705 (f)(2):

> "Except to the extent that the Secretary determines otherwise, no grants shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group

members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

Sec. 317.19, 42 Fed.Reg. 27432 at 27434-5:

"(a) *Competitive bidding.* (1) Construction of each project funded under this part shall be performed by contract awarded by competitive bidding, unless

(i) The Assistant Secretary makes a determination that, under circumstances relating to that project, a method of contract award other than competitive bidding is in the public interest.

(2) If the Assistant Secretary does not waive the competitive bidding requirement, the following procedures apply.

(i) Contracts for the construction of such projects shall be awarded on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility.

(ii) The award of a contract for the construction of a project funded under this part may be subject to review by the Assistant Secretary. The Assistant Secretary may withhold his concurrence from the award of a contract for good cause.

(iii) No requirements or obligations shall be imposed as conditions precedent to the award of a contract or to the Assistant Secretary's concurrence in the award unless such requirements or obligations are lawful and set forth in the advertised specifications.

(b) *Minority business enterprise.* (1) No grant shall be made under this part for any project

unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

(2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority business located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured."

A copy of the judgment, entered November 2, 1977, is attached hereto as Appendix B. Copies of the Notices of Appeal filed December 1, 1977, by the City Appellant and December 2, 1977 by County Appellants in the United States District Court, Central District of California are attached hereto as Appendices C and D.

Questions Presented.

Whether the United States District Court, Central District of California erred:

(1) In holding and concluding that the action was ripe for judicial review and that the Appellees and Cross-Appellants did not need to exhaust their administrative remedies.

(2) In holding and concluding that the Appellees and Cross-Appellants had standing to sue.

(3) In holding and concluding that Public Law 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2) and the rules and regulations issued thereunder were unconstitutional because they contravened the due process clause of the Fifth Amendment insofar as they violated the equal protection clause of the Fourteenth Amendment.

(4) In holding and concluding that the Public Law 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2) and the rules and regulations issued thereunder were invalidated by Title VI of the Civil Rights Act of 1964, Sections 601 and 602, 42 U.S.C. 2000d and 2000d-1.

Statement of the Case.

The Congress, on May 13, 1977, enacted the Public Works Employment Act of 1977 (91 Stat. 116-121, Pub.Law 95-28), amending the Local Public Works Capital Development and Investment Act of 1976 (90 Stat. 999-1012, Public Law 94-369), acts enacted for the purpose of alleviating national unemployment. The acts are administered by the Secretary of Commerce through the Economic Development Administration which distributed program funds for construction of public works projects to state and local applicants.

The 1977 Act contained Sec. 103(f)(2), which provided for a ten percent set aside for minority business enterprises. Rules and regulatories were issued pursuant to the Act, including Reg. 317.19(b)(2) (May 27, 1977), implementing the ten percent provision but also providing for a waiver from the ten percent requirement when, in effect, there was a showing of non-availability of minority businesses in a particular trade area.

The Economic Development Administration notified the City of Los Angeles on June 10, 1977, of its allocation under the 1977 Act. Part of this sum was distributed to the Los Angeles City Unified School District, a separate entity. The City, on June 23, 1977, authorized the submission of its priority list of 48 projects totalling $29.8 million to the Economic

Development Administration. Grant agreements followed. Similarly, after allocation of certain funds to school districts located within the unincorporated areas of the County, the County entered into 17 grant agreements with the Economic Development Administration totaling slightly more than $28.1 million. The court's ruling did not affect these monies. It is future appropriations under the Act which are affected insofar as to any such appropriation the Secretary of Commerce and the Economic Development Administration would, in effect, be precluded from allocating any funds to the City and County since they could not implement the ten percent minority business enterprise set aside as required by the Act as to any such City or County funding.

The Appellees and Cross-Appellants, on October 5, 1977, filed a complaint for Declaratory and Injunctive Relief seeking to have the provision of the Act of Congress, Sec. 103(f)(2) of Public Law 95-28 and the implementing Federal rules and regulations declared unconstitutional and their application by the Appellants enjoined. The United States District Court, Central District of California, on October 6, 1977, issued a temporary restraining order. A hearing was held on October 31, 1977. On that date the court considered a motion for summary judgment filed by Appellees and Cross-Appellants and a motion for summary judgment filed by the Federal Appellants and joined in by the local Appellants.

The District Court, on November 1, 1977, ruled that summary judgment be entered for Appellees and Cross-Appellants declaring Sec. 103(f)(2) and the rules and regulations implementing it unconstitutional with judgment being entered on November 2, 1977.

The Questions Submitted Are Substantial.

The United States District Court, Central District of California, by declaring the provision of the Act of Congress and the implementing rules and regulations unconstitutional and enjoining the Appellants from implementing them as to any future grants under the Act has, in effect, precluded any future allocations being made to either the City or County of Los Angeles. Since the Federal Appellants are required to administer the Act as written they would not be in a position to allocate funds to the local Appellants if neither the Federal nor local Appellants could comply with a requirement of the Act, namely Sec. 103(f)(2), as to such allocation. Though there is a waiver provision in Sec. 317.19(b)(2) of the Rules and Regulations that section, by its language, only applies to non-availability of minority business enterprises in a particular trade area, and, furthermore, by the terms of the judgment the Appellants are restrained from applying, carrying out or implementing Sec. 317.19 specifically.

The judgment thus deprives the City and County of Los Angeles from taking advantage of an Act which provides funding to fight unemployment, to construct public works facilities which benefit an area of approximately seven million people and to help build healthy minority businesses.

Minority businesses account for less than one percent of national business receipts although minorities comprise approximately 17 percent of the total population. Average receipts per paid employee in minority firms is only 57 percent of those of non-minority firms. It has been estimated minority firms are awarded substantially less than 1 percent of the money expended for governmental contracts. At least one other Federal

District Court has upheld the constitutionality of Sec. 103(f)(2) (*Constructors Association of Western Pennsylvania v. Juanita Kreps, et al.*, (W.D., Pa. 1977). This case has not been reported yet. A copy of the opinion is attached hereto as Appendix E.

Conclusion.

For reasons stated above, it is respectfully submitted that the questions presented are substantial and of great public importance. It is submitted that this Court should note probable jurisdiction and set the matter for argument.

Respectfully submitted,

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APPENDIX A.

Decision and Order (Granting Declaratory and Injunctive Relief Against "Race Quota" System for Federal Grants to Local Los Angeles Agencies).

United States District Court, Central District of California.

Associated General Contractors of California, a nonprofit corporation; Engineering Contractors Association, a nonprofit corporation; American Subcontractors Association, a nonprofit corporation; Los Angeles County Chapter, National Electrical Contractors Association, Inc., a nonprofit corporation; Steve P. Rados, Inc., a corporation; Griffith Company, a corporation; Gordon H. Ball, Inc., a corporation; Stoddard Enterprises, a sole proprietorship; and Granite Construction Company, a corporation, Plaintiffs, v. Secretary of Commerce of the United States Department of Commerce; U.S. Department of Commerce; Los Angeles County, a body corporate and politic; Los Angeles County Board of Supervisors; Los Angeles Flood Control District; Los Angeles County Engineer; Facilities Department of Los Angeles County; City of Los Angeles, a municipal corporation; Los Angeles City Council; Department of Recreation and Parks of the City of Los Angeles; Department of Public Works of the City of Los Angeles, Defendants. Civ. No. 77-3738-AAH.

Filed: November 2, 1977.

APPEARANCES:

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FEDERAL DEFENDANTS

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LOCAL DEFENDANTS

RICHARD L. LANDES, ESQ., Deputy County Counsel, Room 648, Hall of Administration, Los Angeles, California 90012, Attorney for County Defendants, Los Angeles County, Los Angeles County Board of Supervisors, Los Angeles Flood Control District, Los Angeles County Engineer and the Facilities Department of Los Angeles County.

JOHN F. HAGGERTY, ESQ., Assistant City Attorney, 1700 City Hall East, 200 N. Main Street, Los Angeles, California 90012, Attorney for City Defendants, City of Los Angeles, Los Angeles City Council, Department of Recreation and Parks of the City of Los Angeles, and Department of Public Works of the City of Los Angeles.

This matter arises upon plaintiffs' complaint for declaratory and injunctive relief based upon the alleged unconstitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116-121, 42 U.S.C. 6705(f)(2), which requires that 10 percent of the amount of each federal grant applied for under the Act be expended for "minority business enterprises."[1] The Act has been implemented by rules and regulations[2] issued by the Secretary of Commerce under the authority given to him in the original Local Public Works Capital Development and Investment Act of 1976, 42 U.S.C. §§6701-6735 (1977), which was amended by the Public Works Employment Act of 1977. Plaintiffs seek declaratory judgments that the Department of Commerce and Secretary of Commerce's (Federal Defendants) enforcement of the minority business enterprises provisions of Pub. L. No. 95-28 and the regulations promulgated thereunder, as well as the policies of the City and County of Los Angeles and their agencies named defendants (Local Defendants) of devising, approving, advertising, and awarding bids in accordance with the provision of the statute and regulations, violated and violate plaintiffs' rights under the Fifth Amendment to the United States Constitution. Plaintiffs also sought injunctive relief, by way of a temporary restraining order, order to show cause why a preliminary injunction should not be granted, and a permanent injunction, restraining

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[1]1977 U.S. Code Cong. & Adm. News, Vol. 5, p. 91 Stat. 116, at 117 (June, 1977) 42 U.S.C. 6705(f)(2). For full text of Pub. L. No. 95-28, see Appendix A attached.

[2]Chap. III, Part 317, especially Section 317.19(b), 42 Fed. Reg. Sec. 317(b)(2), 27432 at 27434-5 (May 27, 1977). For full text of the rules and regulations, see 42 Fed. Reg. 27432-27440, Appendix B attached.

all defendants from enforcing and complying with the said minority business enterprises provisions.

After the October 6, 1977, initial hearing, this Court issued its temporary restraining order, extended it for an additional ten days, and set the hearing on the preliminary injunction for October 31, 1977. On October 21, 1977, the Federal Defendants filed a motion for summary judgment, for which motion an application shortening time to notice the motion to October 31, 1977, was properly made and approved. *See* Local Rules 3(e) and 3(f), Central District of California. The Local Defendants and the plaintiffs have orally made and joined in the motion for summary judgment by their own motions and counter motions for summary judgment, whereupon the Court proceeded to hear and rule by consolidating the hearing on the preliminary injunction with the hearing on the merits on the permanent injunction, by way of hearing the motions and counter motions for summary jdugment. Fed. R. Civ. P., Rule 65(a)(2).

I
STATUTORY BACKGROUND

The Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735 (1977) (hereinafter "LPW Act"), for the implementation of which Congress appropriated $2 billion, was enacted for the purposes of alleviating the problem of nationwide unemployment and stimulating the national economy by assisting state and local governments to build badly needed public facilities. *See* H. R. Rep. No. 94-1007 re Pub. L. No. 94-369, 94th Cong., 2d Sess. (1976).[3]

[3]1976 U.S. Code Cong. & Adm. News, Vol. 3, pp. 1746-7 (1976). For full text see pp. 1746-1767.

The program was to be administered by the Secretary of Commerce acting through the Economic Development Administration (hereinafter "EDA"), which distributed program funds for construction of public works projects to state and local government applicants. In order to expedite the initiation of construction projects contemplated by the LPW Act, Congress provided that the Secretary shall make a final determination upon each application within 60 days of receipt, with failure to take action within the prescribed period deemed to be approval [42 U.S.C. § 6706]; that the Secretary shall prescribe any rules and regulations necessary to carry out the provisions of the LPW Act within 30 days of its enactment [42 U.S.C. § 6706]; and that on-site labor must begin within 90 days of project approval if funds are available [42 U.S.C. § 6705(d)]. Between October 26, 1976, and February 9, 1977 ("Round I"), approximately 2000 projects were approved and the appropriate Federal grants made, exhausting the $2 billion orginally authorized and appropriated.

On May 13, 1977, Congress enacted the Public Works Employment Act of 1977, 91 Stat. 116-121, Pub. L. No. 95-28 (hereinafter the "PWE Act"),[4] amending the LPW Act. The PWE Act (denoted "Round II") was designed to correct certain inadequacies of Round I and to increase funding for public works projects. By the PWE Act of 1977, a total of $6 billion was authorized to be expended in carrying out Round I and Round II under the provisions of the PWE Act, Pub. L. No. 95-28, § 109 (May 13, 1977), of which $4 billion was appropriated by Con-

[4]See footnote 1, *supra*.

gress, Pub. L. No. 95-29, Chap. III (May 13, 1977).[5] Congress remained aware of the importance of the infusion of Federal funds into the depressed construction industry, H.R. Rep. No. 95-20, 95th Cong., 1st Sess. 1-2 (1977),[6] and, seeking to avoid any unnecessary delay in the implementation of the PWE Act, added the provision in the PWE Act that the Secretary shall not consider any application submitted subsequent to December 23, 1976, Pub. L. No. 95-28, § 107(h)(1) (May 13, 1977), in addition to retaining those deadlines originally set forth in 42 U.S.C. §§ 6705(d), 6706.

Included in the PWE Act was the following provision:

> "(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Pub. L. No. 95-28, 91 Stat. 117, Sec. 103(f)(2).[7]

[5]Pub. L. No. 95-29, 1977 U.S. Code Cong. & Adm. News, Vol. 5, pp. 91 Stat. 122 at 123-4 (June 1977). For full text see Appendix A attached.

[6]See legislative history of Pub. L. No. 95-28, particularly H. Rep. No. 95-20 (p. 1), 1977 U.S. Code Cong. & Adm. News, p. 716. For full text see footnote 18, *infra,* and Appendix D attached.

This Minority Business Enterprises ("MBE") provision was introduced on the House floor during debate and was intended ostensibly to remedy the situation in which "The average percentage of minority contracts, of all Government contracts, in any given fiscal year is 1 percent—1 percent." 123 Cong. Rec. p. H-1437-8 (daily ed. February 24, 1977).[8] Economic Development Administration Guidelines for implementation of the MBE provision indicate that "[w]hen prime contractors are selected through competitive bidding, the Grantee [state or local government] must require that each bid include a commitment to use at least 10 percent of the contract funds for MBEs. . . . In the case of projects involving more than one contract . . . some of the contractors may themselves be MBEs. . ." MBE *Guidelines,*[9] pp. 8, 9.

Among the rules and regulations promulgated by the Secretary pursuant to his authority to prescribe necessary regulations [42 U.S.C. § 6706] is the provision that the MBE requirement may be waived as to any grant for which the Assistant Secretary determines that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade

[7]See footnote 1, *supra,* and Appendix A.

[8]These, of course, are the remarks of Hon. Parren Mitchell (D. Md.) who introduced this provision as an amendment from the floor during debate on the PWE. For full text, see Appendix C attached.

[9]These "Guidelines" of the EDA are not published anywhere that the Court can find, and are drawn from attachments to the Federal Defendants' briefs and affidavits herein, but, apparently, they were made available, if asked for, to the Local Defendants as applicant grantees for the Federal funds under Round II.

area. Reg. 317.19(b)(2), 42 Fed. Reg. 27432, 27434-5 (May 27, 1977).[10] And the EDA Guidelines elaborate to some extent:

> "The Grantee must demonstrate that there are not sufficient, relevant, qualified minority business enterprises whose market areas include the project location to justify a waiver. The Grantee must detail in its waiver request the efforts the Grantee and potential contractors have exerted to locate and enlist MBEs. The request must indicate the specific MBEs which were contacted and the reason each MBE was not used. EDA will consider the degree to which the Grantee and potential contractors have used available referral sources and related assistance in evaluating waiver requests." MBE *Guidelines,* pp. 13, 14.[11]

II
STATEMENT OF FACTS

Under Round II, and by September 30, 1977, the Secretary of Commerce had granted and obligated the entire $4 billion PWE Act authorization and the appropriation by Public Law 95-29[12] including $29,782,-

[10]"(b) *Minority business enterprise.*

(1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.

(2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured."

[11]See footnote 9, *supra.*

[12]For Pub.L. No. 95-29, see 1977 U.S. Code Cong. & Adm. News, Vol. 5, June 1977, enacted May 13, 1977, p. 91 Stat. 122 at 91 Stat. 123-124. Appendix A has full text.

108 for Los Angeles City projects, and $28,109,085 for Los Angeles County projects. Bid openings for these projects were to commence on October 7, 1977; however, because of the issuance of the temporary restraining order, no contracts have been awarded under Round II.

Plaintiffs are four nonprofit incorporated contractors' associations and five businesses engaged in general contracting work. The associations allege that a substantial number of their members desire to bid on contracts to be funded under the PWE Act, and on behalf of these members, allege that the MBE provision in Pub. L. 95-28 and the rules and regulations thereunder issued constitute discrimination on the basis of race in the awarding of public funds in violation of the Fifth Amendment to the United States Constitution. The individual contractors allege that sufficient qualified[13] minority contractors do not exist to enable compliance with the MBE provision, and that the MBE provision increases the bid price which such contractors must submit. There is no allegation that any plaintiff has requested the Local Defendants to seek a "waiver" of the MBE provisions of Sec. 317.19(b)(1) of the rules and regulations pursuant to § 317.19(b)(2) thereof. 42 Fed. Reg. 27432 at 27435 (May 27, 1977).[14]

III
ADMINISTRATIVE REMEDY

Defendants' initial contention is that the waiver procedure authorized in § 317.19(b)(2) of the rules and regulations, and set forth in the MBE *Guidelines,*

[13]"Qualified" is defined in the MBE Guidelines, pp. 3-4.

[14]See footnote 2, *supra,* Appendix B for full text.

affords an administrative remedy which renders unmeritorious plaintiffs' allegation that there is an insufficient number of qualified MBEs in the Los Angeles area.[15]

While the Court recognizes the conflict in authorities dealing with the question of exhaustion of administrative remedies when a constitutional claim is at issue [K. Davis, Administrative Law of the Seventies (1976), § 20.04], it is apparent that the seeking of a waiver of the applicability of the MBE provision would result simply in circumvention of the issue which plaintiffs seek to have resolved. Plaintiffs complain of injury under an allegedly unconstitutional statute, and "[a]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies." *Oestereich v. Selective Service Board,* 393 U.S. 233, 242 (1968) (citations omitted). The purposes of the exhaustion doctrine, avoidance of interruption of the agency's duty to apply a statute in the first instance, development of the factual background upon which decisions should be based, and deference to the agency's discretion and expertise, *McKart v. United States,* 395 U.S. 185, 193-94 (1969), are not served by requiring constitutional issues to be argued before an administrative agency.

No further development of the facts is necessary in this case; no administrative discretion is involved; no determination of the applicability of the MBE provisions to plaintiffs is needed. Unlike the claim in

[15]The effect of plaintiffs' failure to pursue this alleged procedure is also an important aspect of all Defendants' arguments that plaintiffs lack standing to bring this action and that the case is not ripe for judicial review, since only claimed final agency action is subject to review under the Federal Administrative Procedure Act. 5 U.S.C. § 704.

Montana Chapter of Association of Civilian Technicians, Inc. v. Young, 514 F.2d 1165 (9th Cir. 1975), plaintiffs' primary claim before this Court is the infringement upon their Constitutional rights. In *Young, supra,* the claim was for a declaration that certain issues upon which defendant refused to negotiate were in fact the proper subject for negotiation pursuant to an Executive Order. Thus, "[t]he necessity of deciding the constitutional issues may well . . . [have been] avoided by the grant of alternative relief,"[16] because the constitutional issue would never arise if the agency determined that the issues were negotiable. In the case here before us, the Constitutional issue has arisen, but it may never be decided if it is insisted that plaintiffs go before an administrator and ask him to rule upon something which he has no authority to decide. *See also Public Utilities Commission v. United States,* 355 U.S. 534 (1958) (United States not required to exhaust state administrative remedy; "an administrative proceeding might leave no remnant of the constitutional question . . . . [b]ut where the only question is whether it is constitutional to fasten the administrative procedure onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right.") 355 U.S. at 539-540.

Further, the administrative remedy to be pursued here belongs to the Local Defendants, not to plaintiffs: the MBE Guidelines state that "[o]nly the Grantee can request a waiver." MBE *Guidelines,* p. 14. Thus, while plaintiffs may ask the Local Defendants to request a waiver, this possibility obviously allows plaintiffs

[16]Montana Chapter of Ass'n of Civilian Technicians, Inc. v. Young, 514 F.2d 1165, 1167-68 (9th Cir. 1975).

no control over either the decision to seek a waiver or its presentation to the Secretary. Such a procedure hardly affords any administrative remedy which could preclude judicial determination of plaintiffs' claim.

In addition to arguing that the exhaustion doctrine precludes standing, defendants contend that plaintiffs have suffered no injury at this point in the administration of Round II. With respect to associational standing, the Supreme Court said in *Warth v. Seldin,* 422 U.S. 490, 511 (1975),

> "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members. *E.g., National Motor Freight Assn. v. United States,* 372 U.S. 246 (1963) . . . . The association must allege that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit. [citation omitted] So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction."

Plaintiff contractors, and contractors represented by associations, which are before this Court are clearly suffering the immediate, threatened injury of bidding on construction contracts on terms with which they are unfamiliar, of distinguishing between subcontractors on grounds allegedly unrelated to the characteristics

upon which contractors normally employ subcontractors, and submitting bids higher than they otherwise might expect to submit. Plaintiff subcontractor, and subcontractors represented by associations, are threatened with being denied a prescribed percentage of the construction dollar in Los Angeles County due to the application of the MBE provisions.

In *Warth v. Seldin, supra,* the Supreme Court held that an association of firms engaged in residential construction lacked standing to challenge the constitutionality of a city ordinance which allegedly precluded persons of low and moderate income from residing in the city. The Court ruled that, because the association sought damages rather than declaratory or injunctive relief, any injury was peculiar to the individual member, and would necessitate individual proof. The Court also held that there had been no averment that the ordinance had been responsible for the denial of a building permit for any specific project contemplated by the association. In the case before this Court, however, plaintiffs seek injunctive and declaratory relief from a provision which allegedly removes them from consideration for an identified percentage of construction funds targeted for specific, planned projects. Thus, injury to plaintiffs is clear, and they have standing to bring this action.

Moreover, this case presents "a real and substantial controversy admitting of specific relief though a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Insurance Co. v. Haworth,* 300 U.S. 227, 241 (1937). This Court rejects Federal Defendants' argument that facial constitutional invalidity can never be asserted where there is a waiver

provision. Accordingly, there is a justiciable controversy between plaintiffs and defendants which is appropriate for judicial determination.

The Court also notes that laches is inapplicable to this case. Plaintiffs brought this action five days after the September 30, 1977, deadline for obligating the entire $4 billion in PWE Act funds appropriated by Congress. Any earlier action by plaintffs would not have defined a concrete controversy, since additional projects might have been approved by the Secretary until September 30. The test of laches is prejudice to the opposing party. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 215 (1963). Federal Defendants are not prejudiced in this case because they have fully performed their function of granting and obligating the funds appropriated and approving the necessary projects. Local Defendants offer no indication of prejudice flowing from the *timing* of the filing of this action, as opposed to prejudice flowing simply from the *filing* of the action.

IV
CONSTITUTIONAL DUE PROCESS AND EQUAL PROTECTION

The gravamen of plaintiffs' complaint is that the MBE provisions infringe upon their rights to due process of law, by creating a classification which denies the granting of Federal construction funds solely on the basis of race. Although the Fifth Amendment to the United States Constitution does not contain an equal protection clause, discrimination which contravenes the Equal Protection Clause of the Fourteenth Amendment violates the due process clause of the Fifth Amendment. *Johnson v. Robinson,* 415 U.S. 361,

364, n. 4 (1974); *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954).

The initial question confronting this court is whether the MBE provisions in fact create a "classification" or whether they constitute a "remedy" for past discrimination. Programs which eliminate discrimination are clearly necessary, and have been judicially decreed or approved to dismantle dual school systems which impermissibly perpetuate separation of the races in public schools. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Further, Title VII of the Civil Rights Act of 1964[17] has been held to mandate the award of retroactive seniority to victims of discrimination in hiring on the basis of race, *Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976), and a state redistricting plan, which was drawn with racial considerations aimed at correcting past discrimination, has been upheld under the Voting Rights Act of 1965 and found not to contravene the Fourteenth Amendment. *United Jewish Organizations, Inc. v. Carey,* 430 U.S. 144 (1977). Thus, it is clear that, "[j]ust as . . . race . . . must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy." *North Carolina State Board of Education v. Swann,* 402 U.S. 43, 46 (1971).

However, it is also clear that a generalized assertion of "remedy" cannot exempt a racial classification from careful judicial examination, lest such an assertion be invoked as justification for obviously invidious discrimination. In fashioning a remedy for racial discrimination, there must be no discrimination against innocent non-

[17]78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.*

minorities. In *United Jewish Organizations, Inc. v. Carey,* 430 U.S. 144, 165 (1977), Justice White, with Justices Stevens and Rehnquist concurring, stated:

> "There is no doubt that in preparing the 1974 legislation, the State deliberately used race in a purposeful manner. But its plan represented no racial slur or stigma with respect to whites or any other race, and we discern no discrimination violative of the Fourteenth Amendment . . . ."

In the case before this Court, there is no doubt that nonminority contractors and subcontractors are denied a specified percentage of Federal funds solely on the basis of their race. In addition to depriving these plaintiffs of equal treatment under the PWE Act, the MBE provisions, as a result of their asserted role in remedying "past discrimination," indicate that plaintiffs are members of an industry guilty of a history of discrimination against minorities, a contention which has not been substantiated in this case.

Moreover, at least in the area of desegregation, the Supreme Court has suggested that the school desegregation remedies there discussed may be limited to the specific context of achieving unitary public school systems:

> "It would not serve the important objective of *Brown I* [Brown v. Board of Education, 347 U.S. 483 (1954)] to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination." *Swann v. Charlotte-Mecklenburg Board of Education, supra,* at 22-23.

The remedies discussed in the above-mentioned cases also appear to be directed only at eliminating the racial injustice practiced, rather than at attempting to establish an arbitrary level of compensation which will counterbalance prior wrongs. In this respect *Kahn v. Shevin,* 416 U.S. 351 (1974), and *Califano v. Webster,* 430 U.S. 313 (1977), are inapposite, since they deal with classification on the basis of gender, rather than race. Hence, this Court concludes that the MBE provisions constitute a purely racial classification and must be examined as such.

It should also be noted at this point that, while the Supreme Court has recognized that the Fourteenth Amendment was precipitated by discrimination against Blacks [*Strauder v. West Virginia,* 100 U.S. 303, 306 (1879); *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 71-72 (1873)], its protection extends to all races, including whites. *Shelley v. Kraemer,* 334 U.S. 1, 22 (1948); *Yick Wo v. Hopkins,* 118 U.S. 356, 369 (1886); *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 72 (1873). *See also United Jewish Organizations, Inc. v. Carey, supra,* at 165; *Bakke v. Regents of the University of California,* 18 Cal. 3d, 34, 51 (1976), outlawing a race quota in medical school, and *McDonald v. Santa Fe Trail Transportation Co.,* 427 U.S. 273 (1976), holding that 42 U.S.C. § 1981 prohibits private employment discrimination against whites as well as nonwhites.

Classifications based solely upon race must be subjected to the most rigid judicial scrutiny. *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Bolling v. Sharpe, supra,* 347 U.S. 497, 499 (1954); *Korematsu v. United States,* 323 U.S. 214, 216 (1944); *Hirabayashi v.*

United States, 320 U.S. 81, 100 (1943). In related circumstances, this scrutiny has been held to require that the government must establish a compelling governmental interest for the classification, which interest is unrelated to race, and show that there are no alternative means to advance that interest which would impose a lesser burden on the group disadvantaged. *Loving v. Virginia,* 388 U.S. 1, 11 (1967); *Dunn v. Blumstein,* 405 U.S. 330, 337 (1972); *Constructors Association of Western Pennsylvania v. Kreps,* Civil No. 77-1035 (W.D. Pa., October 13, 1977); *Bakke v. Regents of the University of California, supra* at 49.

The legislative history of the PWE Act indicates that it was intended "to help revitalize the Nation's financially-pressed communities and reactivate the distressed construction industry with its hundreds of thousands of jobless workers. . . ." H. R. Rep. No. 95-20, 95th Cong., 1st Sess. 1 (1977).[18]

While the legislative history includes no mention of the MBE provisions, Federal Defendants cite the Court to the remarks of Representative Mitchell, sponsor of the MBE amendment on the floor of the House of Representatives, which indicate a desire to correct the situation in which minority businesses are given only 1 percent of all government contracts in any fiscal year. 123 Cong. Rec. H. 1436-1437.[19] Congress apparently became concerned with unemployment in minority communities and the rate of dissolution of

[18]1977 U.S. Code Cong. & Adm. News, Vol. 5, June 1977, pp. 716-728. For full text see Appendix D attached.

[19]See footnote 8, *supra,* for floor debate when Congressman Mitchell introduced these "race quota" provisions as an amendment on February 24, 1977. Appendix C has full text.

minority businesses, mainly by the persuasive rhetoric of Congressman Mitchell, but no study was made and there is no legislative history of this Mitchell Amendment.

The Court recognizes the laudable goal of directing aid to that portion of the community which is suffering from severe unemployment. However, the MBE provision does not advance a governmental purpose unrelated to race. In fact, it is based on race alone—an invidious race quota. It is not contended here that minority business enterprises are more capable than nonminority businesses. No racially neutral justification is offered for the MBE provisions. Indeed, the specific objective asserted for this classification is the preference of one group of races over another. It is not a permissible governmental objective to direct financial assistance to segments of the community which are classified solely on the basis of race to the exclusion of other segments.

Moreover, the "remedy" versus "classification" distinction is inapplicable in this situation, where no discrimination against the minority business enterprises sought to be assisted by this legislation has been alleged. Federal Defendants have contended that a Congressional desire to remedy prior discrimination is "implicit" in Congressman Mitchell's remarks, but no specific evidence of such discrimination was shown by him, nor has any such evidence been offered by Federal Defendants, or any parties to this lawsuit.

Further, the MBE provisions fail the second part of the compelling governmental interest test, since underemployed minorities in the construction industry could be aided by racially neutral legislation having

less of a detrimental impact upon non-minority contractors. For example, the 10 percent set-aside could be directed at those businesses which have experienced a low prescribed level of unemployment or income within the preceding year, and the Department of Commerce could take affirmative steps to ensure that businesses in geographical areas of high unemployment become particularly aware of Federally funded projects which were being planned and to familiarize such businesses with the larger general contractors which customarily bid on Federally funded projects.

Prior to and at the hearing on Summary Judgment, Federal Defendants supplied the Court with an Opinion and Order of the Honorable Daniel J. Snyder, Jr., United States District Judge, ... F. Supp. .... (W.D. Pa. No. 77-1035, Oct. 13, 1977), in the case of *Constructors Association of Western Pennsylvania v. Kreps,* a case with issues identical to ours. In that Opinion and Order, Judge Snyder denied a preliminary injunction on the grounds that while the same 10% racial quota for subcontractors deserved the strictest scrutiny of the Court since it is inherently constitutionally suspect, *id.* at 19, 11. 9-11. Nevertheless, and while viewing the lack of legislative history as "troublesome," he concluded that the 10% quota based on race alone "is the only effective way to crack the competitive barriers and end the cycle which continually excludes minority businesses from proportionate participation." *Id.* at 24, ll. 7-9. To this conclusion, I take exception and therefore, with his Opinion and Order, I dis-

agree, with all due respect and humility. Perhaps the *Bakke* case now before the Supreme Court on certiorari will settle the matter for both Judge Snyder and this Court. *Bakke v. Regents of the University of California,* 18 Cal. 3d 34 (1976), *cert. granted,* 429 U.S. 1090 (February 27, 1977, No. 77-811), argued before the United States Supreme Court, October 12, 1977, 46 U.S.L.W. 3249.

Quotas are absolutely invidious and unconstitutional. Whether used to exclude minorities as in the old collegiate 10% quota system, or used to include minorities under this new public works subcontractors 10% quota system, as here, every quota based on race or national origin alone is constitutionally invalid and impermissible. In this situation the "10% quota-ed" persons are the stigmatized, and the remaining "non quota-ed" persons are the illegitimatized, whether hurt or helped. All discrimination solely on the basis of race or national origin, direct or reverse, converse or inverse, is invidious and unconstitutional.

Affirmative action and goals are permissible; race quotas are not. It is simple as that, but even worse and inevitably, race quotas do not achieve or even approach the goals desired—personal, familial, economic, educational, recreational and all kinds of human equality, regardless of race or national origin.

Equal protection and non-discrimination in every phase and activity of human life is mandated by equal protection to all persons guaranteed in the Federal

Constitution. Race quotas necessarily run counter to this Constitutional mandate and must be struck down if this Court, and indeed all of us, are to live under and abide by the United States Constitution.

V

THE APPLICABILITY OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, SECTIONS 601 AND 602, 42 U.S.C. 2000d and 2000d-1

Title VI of the Civil Rights Act of 1964, Sec. 601, 42 U.S.C. 2000d[20] provides that no person in the United States shall on the ground of race, color, or national origin be excluded from, denied the benefits of, or be subjected to discrimination under *any* program or activity receiving Federal financial assistance. This unequivocal statutory statement by Congress of the Constitutional guarantee of equal protection and non-discrimination solely on the basis of race, color, or national origin is specifically directed to be enforced by every Federal department or agency rendering Federal assistance to any program or activity. 42 U.S.C. 2000d-1.[21] A plain uncomplicated reading of

[20]The full text follows:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin.

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Pub.L. 88-352, Title VI, § 601, July 2, 1964, 78 Stat. 252.

[21]Full text (italics added):

§ 2000d-1. Federal authority and financial assistance to programs or activities by way of grant, loan, or contract other than contract of insurance or guaranty; rules and regulations; approval by President; compliance with requirements; reports to Congressional committees; effective date of administrative action.

Each Federal department and agency which is empowered to extend Federal financial assistance to *any program* or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, *is authorized and directed to effectuate* the provisions of section 2000d of this title with respect to *such program* or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Pub.L. 88-352, Title VI, § 602, July 2, 1964, 78 Stat. 252.

these two statutes would clearly invalidate the 10% "race quota" system set forth in the "race quota" law here in question, Public Law No. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2),[22] and the rules

[22]Full text is referenced in footnote 1 *supra,* and appears in Appendix A.

and regulations issued by the Commerce Department thereunder, especially Sec. 317.17(b), 42 Fed. Reg. 27432 at 27434-5.[23] But let us consider these statutes in the light of appropriate statutory construction.

The Court is aware of the general rules of statutory construction, which are hornbook law, and which are ordinarily controlling in a problem involving conflicting statutes:

> (1) Where there is no clear intention to the contrary, a specific statute will not be controlled or nullified by a general one, irrespective of the priority of enactment.[24]
>
> (2) In resolving irreconcilable conflicts between successive statutory enactments, the later should be given "primary consideration" over the prior.[25]

But the Court is compelled to go beyond the hornbook and must ascertain the purposes underlying any such conflicting enactments, and may not dispose of the problem solely by using such mechanical judicial slide-rules. *Fanning v. United Fruit Co.*, 355 F.2d 147, 149 (4th Cir. 1966). The two hornbook principles are not to be applied when the results are "extraordinary,"[26] or when the results do not reflect the true "presumed intention of the law making body."[27] It

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[23]Full text is referenced in footnote 2, *supra,* and appears in Appendix B.

[24]Morton v. Mancari, 417 U.S. 535, 550-1 (1974); Bulova Watch Co. v. United States, 365 U.S. 753, 758 (1961).

[25]Araya v. McLelland, 525 F.2d 1194, 1196 (5th Cir. 1976).

[26]Shelton v. United States, 165 F.2d 241, 244 (D.C. Cir. 1947).

[27]United States v. Windle, 158 F.2d 196, 199 (8th Cir. 1946).

follows that when an overriding public interest is demonstrably clear, in that the prior general statute sets forth the true Constitutional mandate, and the later specific statute is less conducive to the public welfare, then the public good controls and the general statute will invalidate the specific statute. So also will the prior invalidate the subsequent.

In our case here, where the prior statutes, 42 U.S.C. § 2000d and § 2000d-1, set forth in clear and unmistakable terms the overriding mandate of the Federal Constitution for equal protection and non-discrimination, they obviously express the true policy of the United States, the true intent of Congress, and the true Constitutional mandate. Any attempt to invalidate them by the "race quota" statute and rules and regulations thereunder would give us, indeed, extraordinary results. Thus, even though they are general and not specific and even though they are prior in time, the Court must necessarily uphold these general and prior statutes and decree the invalidity of the "race quota" system contained in the specific and subsequent 10% "race quota" law and regulations.

The legislative history of Title VI of the Civil Rights Act of 1964, and more particularly Sections 601 and 602, thereof, 42 U.S.C. 2000d[28] and 2000d-1,[29] unmistakably and in the plainest of language, sets forth the Congressional mandate in enacting these two statutes. They codify into statutory formula the equal protection and non-discrimination guarantees of the Federal Constitution.

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[28]Full text at footnote 20, *supra.*

[29]Full text at footnote 21, *supra.*

For instance, House Report No. 914, 88th Congress, 2d Session, in reporting H.R. 7152, later amended and then enacted as 42 U.S.C. 2000d (Sec. 601 of Title VI of the Civil Rights Act of 1964) to the floor, printed out as "Purpose and Content," that Title VI "prohibits discrimination in any Federal financial assistance program."[30] And in the SECTIONAL ANALYSIS portion, the House Report emphatically proclaims as to Title VI:

> "This title declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to carry out this policy."[31]

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[30]1964 U.S. Code Cong. & Adm. News, pp. 2391-2394, at 2391. For full text see Appendix E attached.

[31]In full, the SECTIONAL ANALYSIS of Title VI, 1964 U.S. Code Cong. & Adm. News, pp. 2400-2401, APPENDIX E, follows:

TITLE VI—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

General

This title declares it to be the policy of the United States that discrimination on the ground of race, color, or national origin shall not occur in connection with programs and activities receiving Federal financial assistance and authorizes and directs the appropriate Federal departments and agencies to take action to carry out this policy. This title is not intended to apply to foreign assistance programs.

Section 601.—This section states the general principle that no person in the United States shall be excluded from participation in or otherwise discriminated against on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance.

Section 602 directs each Federal agency administering a program of Federal financial assistance by way of grant, contract, or loan to take action pursuant to rule, regulation, or order of general applicability to effectuate the principle of section 601 in a manner consistent with the achievement of the objectives of the statute authorizing the assistance. In seeking to effect compliance with its requirements imposed under this section, an agency is authorized to terminate or to refuse to grant or to continue assistance under a program to any recipient as to whom there has been an express finding pursuant to a hearing of a failure to comply with the requirements under that program, and it may also employ any other means authorized by law. However, each agency is directed first to seek compliance with its requirements by voluntary means.

Section 603 provides that any agency action taken pursuant to section 602 shall be subject to such judicial review as would be available for similar actions by that agency on other grounds. Where the agency action consists of terminating or refusing to grant or to continue financial assistance because of a finding of a failure of the recipient to comply with the agency's requirements imposed under section 602, and the agency action would not otherwise be subject to judicial review under existing law, judicial review shall nevertheless be available to any person aggrieved as provided in section 10 of the Administrative Procedure Act (5 U.S.C. 1009). The section also states explicitly that in the latter situation such agency action shall not be deemed committed to unreviewable agency discretion within the meaning of section 10. The purpose of this provision is to obviate the possible argument that although section 603 provides for review in accordance with section 10, section 10 itself has an exception for action "committed to agency discretion," which might otherwise be carried over into section 603. It is not the purpose of this provision of section 603, however, otherwise to alter the scope of judicial review as presently provided in section 10(e) of the Administrative Procedure Act.

In stark contrast, the "race quota" provisions in Pub. L. No. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2) have absolutely no legislative history.[32] The most that the defendants can dredge up are the remarks of the Hon. Parren J. Mitchell (D. Md.), United States Congressman from Maryland, who for the first time on

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[32]We search in vain for any legislative history on Pub. L. No. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2), although as we have seen there is voluminous legislative history on Pub. L. No. 95-28 itself. See footnote 18, *supra,* for reference, and Appendix D for full text.

the floor of the House at the time of the debate upon Pub. L. No. 95-28, introduced the 10% "race quota" amendment which, after slight modification has become Section 103(f)(2) of Pub. L. No. 95-28, 42 U.S.C. 6705 (f)(2). But, of course, this is not legislative history. It is only the debate rhetoric of a partisan who sponsored the amendment.

This is not astounding, because, as defendants admit, and as the legislative history of Pub. L. No. 95-28 demonstrates, the amendment sponsored by Congressman Mitchell was never considered by the House or by the Judiciary Committee, and is not mentioned anywhere in House Report No. 914, which reported the Bill to the House Floor without Mitchell's amendment.

The "race quota" provisions in Pub. L. No. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2), the specific and subsequent law, and in the regulations issued pursuant to it cannot be held to invalidate by any kind of theory or implication the overriding Congressional, National, and Constitutional policy in 42 U.S.C. 2000d and d-1, mandating the Federal Constitutional guarantees of equal protection and non-discrimination, even though the "race quota" ostensibly is claimed to benefit minorities, which of course, it does not in reality do. On the contrary, it is a glaring and flagrant violation of both the Congressional intent and National policy, as well as the Constitutional mandate.

It follows that this Court is obliged to declare the "race quota" provision of Pub. L. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(b)(2), and the rules of regulations issued thereunder, especially Section 317.19, 42 Fed. Reg. 27432 at 27434-5, invalid and illegal

under and by virtue of Title VI of the Civil Rights Act of 1964, Sections 601 and 602, 42 U.S.C. 2000d and d-1.

VI
PROPRIETY OF THE REMEDIES SOUGHT

(a) *Declaratory Judgment*

The Federal Judicial Code has since 1948, as amended in 1976, provided that "[i]n a case of actual controversy within its jurisdiction . . . any Court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." 28 U.S.C § 2201.

This statutory determination of the availability of declaratory relief "in a case of actual controversy" is under Rule 57, Fed. R. Civ. P., available in accordance with all of the Federal Rules of Civil Procedure, including the Rule governing the entry of Summary Judgments, Rule 56, Fed. R. Civ. P. And the remedy of Declaratory Judgment is available "whether or not further relief is or could be sought." 28 U.S.C. § 2201.

As we have demonstrated heretofore, the case before us is a "justiciable controversy." See in this connection, 6A Moore's Federal Practice, Paragraph 57.18[2] (2d ed. 1974, as kept up to date by the 1976-77 Cumulative Supplement) "Constitutionality of Public Acts," and cases there cited. The case before us concerns "the rights and other legal relations" of the plaintiffs under the unconstitutional provisions of Pub. L. No.

95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2). Not only have these unconstitutional 10% "race quota" provisions been applied, but they are clearly threatened to be applied in the future, and since the plaintiffs have standing, declaratory relief is properly, factually, and legally invoked here and should be issued, not only with regard to the unconstitutionality of Pub. L. No. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2), but also with respect to the relevant rules and regulations issued thereunder by the Federal Defendants, especially Section 317.19(b), 42 Fed. Reg. 27432, 27434-5. Based on race alone they are unconstitutional on their face and as applied; and we might add, since they are threatened to be applied in this situation, a declaratory judgment is obligatory.

Since we have also found that Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and d-1 are applicable to invalidate Pub. L. No. 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2), declaratory relief should also be granted to plaintiffs upon this ground.

(b) *Injunctive Relief*

While the basic elements of injunctive relief are present here where we have an unconstitutional and illegal "10% race quota" system, the Affidavit of Arthur J. Sulvetta, Attachment N to Federal Defendants' Motion for Summary Judgment, makes it clear that any restraint retroactively or retrospectively applied would work a serious and irreparable injury upon the Local Defendants and upon the people and economy of Los Angeles County and Los Angeles City.

As Sulvetta, an apparently extremely well qualified economist, declares, all of the $4 billion appropriated to date have been granted, including more than $57

million for the Local Defendants: $29,782,108 for the City of Los Angeles and its departments, offices and projects; and $28,109,085 for the County of Los Angeles, and its departments, offices and projects.

Moreover, Sulvetta estimates that those projects will generate approximately 5,613 to 6,068 person-years of jobs, involving 1,910,901 hours of employment, the equivalent of a full year of employment for 1,517 construction workers, translated into 12,265 workers to be employed on these local projects. He further estimates that 489 person-years in indirect jobs associated with the construction industry here on these projects in Los Angeles City and County.

Finally, Sulvetta estimates that a one-year delay in project construction activities would increase costs an additional $7.6 million over and above the $59 million for the Local Defendants; and a two year delay would result in $16.1 million increase in costs.

Founded as they are on reliable studies by the Rand Corporation and other equally reliable studies and statistics, Sulvetta's Affidavit convinces the Court that retroactive or retrospective application of injunctive relief would be in essence a financial, economic, and fiscal disaster for the Local Defendants, their residents, and their economies.

And, of course, Sulvetta's estimates are substantiated in every material respect by the affidavits submitted by the Local Defendants, specifying in some detail the public injury that would result if projects were held up for any length of time, consisting as they do of police facilities, schools, recreation centers, senior citizen facilities, storm drains, sewerage facilities, flood control projects, hospital additions, medical and surgery

augmentations, fuel storage facilities, landscaping, and numerous other public works.

We are thus fully aware of the tremendous detriment and harm that necessarily would befall the defendants if any injunctive relief were to be made retroactive, as so clearly demonstrated by the most recent affidavits of the defendants and the acts of the plaintiffs themselves by their undue delay and even fault in filing their action and in failing and refusing to bid, even though they were under the clear threat of the defendants to deny awards to any such bids. This awareness obliges this Court to apply any injunctive relief solely and only in the future and prospectively. This is not to say that the statute is not unconstitutional for we have already held that it is. But the Court does have equitable discretion to consider all of the circumstances in determining how far reaching and in what time frame restraint should be ordered. The Court finds and concludes that it should operate only in the future, balancing as it must the needs of and detriment that might be suffered on both sides, depending on the prospective or retroactive thrust of injunctive relief.

It is abundantly clear, therefore, that the injunctive relief in the Judgment should be fashioned so as to apply only prospectively in accordance with the principles laid down by the Supreme Court in *Linkletter v. Walker,* 381 U.S. 618, 627-629 (1965), and *Chicot County District v. Bank,* 308 U.S. 371, 374 (1940). In fashioning this prospective injunctive application we should keep in mind two dates today, October 31, 1977, with respect to the Federal Defendants, and December 31, 1977, with respect to the Local Defendants.

And just as absolutely clear from the Sulvetta Affidavit it is that no injunctive relief should be issued, applied or even contemplated with respect to Federal grants made to local agencies throughout the United States, other than the Local Defendants. To do so would be to pass judgment on some $4 billion worth of projects and controversies throughout the nation with totally unacceptable and undoubtedly baleful consequences. It is wholly repugnant to this Court, and, of course, will not be ordered.

VII
ORDER

By reason of the foregoing Decision, Findings of Fact and Conclusions of Law it is hereby ordered that judgment be entered for plaintiffs and against defendants for declaratory relief and permanent injunction in accordance herewith.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: November 1, 1977.

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

The Clerk of this Court is directed to file and enter this Decision and Order and serve all parties forthwith.

APPENDIX B.

Summary Judgment for Declaratory and Injunctive Relief.

United States District Court, Central District of California.

Associated General Contractors of California, a nonprofit corporation; Engineering Contractors Association, a nonprofit corporation; American Subcontractors Association, a nonprofit corporation; Los Angeles County Chapter, National Electrical Contractors Association, Inc., a nonprofit corporation; Steve P. Rados, Inc., a corporation; Griffith Company, a corporation; Gordon H. Ball, Inc., a Corporation; Stoddard Enterprises, a sole proprietorship; and Granite Construction Company, a corporation, Plaintiffs, v. Secretary of Commerce of the United States Department of Commerce; U. S. Department of Commerce; Los Angeles County, a body corporate and politic; Los Angeles County Board of Supervisors; Los Angeles Flood Control District; Los Angeles County Engineer; Facilities Department of Los Angeles County; City of Los Angeles, a municipal corporation; Los Angeles City Council; Department of Recreation and Parks of the City of Los Angeles; Department of Public Works of the City of Los Angeles, Defendants. Civ. No. 77-3738-AAH.

Filed: Nov. 2, 1977.

The Court having duly considered the entire record herein; having examined in detail all of the evidence by way of affidavits, submissions and attachments filed by all parties hereto; having heard and analyzed the arguments presented at the oral hearing on motions and counter motions for summary judgment; and having

made and entered its Decision and Order, including findings of fact and conclusions of law, finding on the basis of the entire record that there is no genuine issue of material fact and concluding that the "10% quota" mandated by Section 103(f)(2) of Public Law 95-28—"Public Works Employment Act of 1977"—enacted May 13, 1977, amending Section 106 (42 U.S.C. § 6705) of the "Local Public Works Capital Development and Investment Act of 1976" (42 U.S.C. §§ 6701 *et seq.*) by adding a new subsection 42 U.S.C. 6705(f)(2), and the rules and regulations implementing said statute issued by the delegate of the Secretary of Commerce, through the Economic Development Administration of the Commerce Department, especially Section 317.19, 42 Fed. Reg. 27432 at 27434-5, in what is termed "Round II of the Local Public Works Capital Development and Investment Program," are and each is unconstitutional and illegal under the United States Constitution particularly Amendment V thereof, and Title VI of the Civil Rights Act of 1964, particularly 42 U.S.C. 2000d and 2000d-1; and good cause thereby appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The Court hereby issues its Declaratory Judgment declaring and determining that said Section 103 (f)(2) of Public Law 95-28, 42 U.S.C. 6705(f)(2), and the rules and regulations issued thereunder and relating thereto, especially Section 317.19, 42 Fed. Reg. 27432 at 27434-5, are and each is in and of themselves on their face and as applied here, unconstitutional under the United States Constitution, including the Fifth Amendment thereof as a denial of equal protection of the laws and as invidious and impermis-

sible provisions for a race quota; and that the said statute and rules and regulations, and the race quota thereby mandated, are illegal, contrary to law and arbitrary, capricious and unreasonable, as violations of Title VI of the Federal Civil Rights Act of 1964, 42 U.S.C. 2000d and 2000d-1.

2. A permanent injunction is hereby issued permanently restraining the Federal Defendants therein, the Secretary of Commerce of the United States, the United States Department of Commerce, the Assistant Secretary of Commerce for the Economic Development Administration and their delegates from enforcing, applying, carrying out or implementing in any manner whatsoever, directly or indirectly, including the allocation or grant of Federal funds authorized in the future, the provisions of said Public Law 95-28, Sec. 103(f)(2), 42 U.S.C. 6705(f)(2), and the said rules and regulations issued thereunder, especially Section 317.19, 42 Fed. Reg. 27432 at 27434-5, from and after October 31, 1977. This injunction shall not govern or apply to Federal funds heretofore granted or to any actions by the Federal Defendants with respect to such funds heretofore granted.

3. A permanent injunction is hereby issued permanently restraining the Local Defendants herein, Los Angeles County, a body corporate and politic, Los Angeles County Board of Supervisors, Los Angeles Flood Control District, Los Angeles County Engineer, Facilities Department of Los Angeles County, City of Los Angeles, a municipal corporation, Los Angeles City Council, Department of Recreation and Parks of the City of Los Angeles, and the Department of Public Works of the City of Los Angeles, from enforcing, applying, carrying out, or implementing directly or indirectly in any manner whatsoever, including the devising, approving, advertising or awarding of bids, the provisions of said statute and said rules and regulations, from and after January 1, 1978. This injunction shall not govern or apply to Federal funds heretofore granted or to any action by Local Defendants with respect to such funds heretofore granted.

DATED: November 1, 1977.

/s/ A. Andrew Hauk
A. ANDREW HAUK
UNITED STATES DISTRICT JUDGE

The Clerk of this Court is directed to file and enter this Summary Judgment for Declaratory and Injunctive Relief, and serve all parties forthwith.

APPENDIX C.

Notice of Appeal to the Supreme Court of the United States.

In the United States District Court, for the Central District of California.

Associated General Contractors of California, a nonprofit corporation; Engineering Contractors Association, a nonprofit corporation; American Subcontractors Association, a nonprofit corporation; Los Angeles County Chapter, National Electrical Contractors Association, Inc., a nonprofit corporation; Steve P. Rados, Inc., a corporation; Griffith Company, a corporation; Fordon H. Ball, Inc., a corporation; Stoddard Enteprises, a sole proprietorship; and Granite Construction Company, a corporation, Plaintiffs, vs. Secretary of Commerce of the United States Department of Commerce; U. S. Department of Commerce; Los Angeles County, a body corporate and politic; Los Angeles County Board of Supervisors; Los Angeles Flood Control District; Los Angeles County Engineer; Facilities Department of Los Angeles County, City of Los Angeles, a municipal corporation; Los Angeles City Council; Department of Recreation and Parks of the City of Los Angeles; Department of Public Works of the City of Los Angeles, Defendants. Civil Action No. 77-3738-AAH.

Notice is hereby given that the City of Los Angeles, a municipal corporation, Los Angeles City Council, Department of Recreation and Parks of the City of Los Angeles and the Department of Public Works of the City of Los Angeles, defendants above named, hereby appeal to the Supreme Court of the United States from the summary judgment for declaratory and injunctive relief to the extent that it declared and

determined that Section 103(f)(2) of Public Law 95-28, 42 U.S.C. 6705(f)(2) and the rules and regulations issued thereunder and relating thereto are unconstitutional and violative of Title VI of the Federal Civil Rights Act of 1964, 42 U.S.C. 2000d and 2000d-1 and further to the extent that it issued a permanent injunction against the Federal and Local Defendants, as specified in the judgment, entered in this action on November 2, 1977.

This appeal is taken pursuant to 28 U.S.C. §1252.

BURT PINES, City Attorney
THOMAS C. BONAVENTURA,
Sr. Assistant City Attorney
JOHN F. HAGGERTY,
Assistant City Attorney
/s/ By John F. Haggerty
JOHN F. HAGGERTY
Attorneys for Defendants, City of
Los Angeles, Los Angeles City Council,
Department of Recreation and Parks
of the City of Los Angeles and
Department of Public Works of the
City of Los Angeles

APPENDIX D.

Notice of Appeal to the Supreme Court of the United States.

In the United States District Court, for the Central District of California.

Associated General Contractors of California, a non-profit corporation; et al., Plaintiffs, v. Secretary of Commerce of the United States Department of Commerce, et al., Defendants. Civ. No. 77-3738-AAH.

NOTICE IS HEREBY GIVEN that LOS ANGELES COUNTY, a body corporate and politic; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LOS ANGELES COUNTY FLOOD CONTROL DISTRICT; LOS ANGELES COUNTY ENGINEER; and FACILITIES DEPARTMENT OF LOS ANGELES COUNTY, defendants in the above-named action hereby appeal to the Supreme Court of the United States from the Summary Judgment for Declaratory and Injunctive Relief in this action on November 2, 1977.

This appeal is taken pursuant to 28 U.S.C. Section 1252.

JOHN H. LARSON, County Counsel
GERALD F. CRUMP, Division Chief
Public Works Division
RICHARD L. LANDES, Deputy County Counsel
/s/ By Gerald F. Crump
GERALD F. CRUMP
Attorneys for Defendants
COUNTY OF LOS ANGELES and LOS ANGELES COUNTY FLOOD CONTROL DISTRICT.

APPENDIX E.

Opinion.

In the United States District Court, for the Western District of Pennsylvania.

Constructors Association of Western Pennsylvania, Plaintiff v. Juanita Kreps, Secretary of Commerce of the United States of America; Milton J. Shapp, Governor of the Commonwealth of Pennsylvania; and Richard Caliguiri, Mayor of the City of Pittsburgh, Defendants. Civil Action No. 77-1035.

SNYDER, J.

The Constructors Association of Western Pennsylvania[1] (the Association) has brought an action for declaratory judgment and injunctive relief to prevent the Secretary of Commerce of the United States from conditioning the contracting of public works projects on 10% minority business enterprise participation, and for an injunction against the City of Pittsburgh (City) and the Commonwealth of Pennsylvania (Commonwealth), as recipients of public works financing to prevent their advertising, seeking of bids, or awarding of contracts based on such minority business enterprise participation (MBE). Presently before the Court is the Plaintiff's Motion for Preliminary Injunction.

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[1]The Association is a nonprofit organization whose membership consists of general contractors and subcontractors in 33 counties in Western Pennsylvania engaged in heavy and highway construction. Association Firms have been awarded 40.9% of the heavy and highway work with the City of Pittsburgh in 1975, and 86% of such work in 1976. Of the heavy and highway construction conducted by the Pennsylvania Department of Transportation in the 33 Western Pennsylvania counties, 74% went to Association Members in 1975 and 56% in 1976.

The Defendants move for judgment on the basis that the Plaintiff is premature in its action, lacks standing and is guilty of laches. This Motion will be denied.

The Association contends that its members will be denied their Fifth Amendment equal protection rights[a] by virtue of the MBE provision of the Public Works Employment Act (PWE) in that (1) PWE cannot survive the tests of strict scrutiny of the suspect classification based upon racial origin, and (2) that under any standard of review, this quota system is invidiously violative of equal protection, for racial and ethnic quotas are constitutionally impermissible, and (3) crude racial and ethnic quotas may not be used in the allocation of scarce economic resources. In all these respects, we find against the contentions raised by the Association, and the preliminary injunction will be denied.

I. THE LEGISLATIVE HISTORY

The Local Public Works Act (LPW) became law on July 22, 1976 and Congress appropriated two billion dollars for its implementation (Pub.L. 94-447). The program was to be administered by the Secretary of

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[2]Although the Fifth Amendment contains no equal protection clause, the due process clause contains an equal protection element, proscribing racial discrimination to the same extent as Fourteenth Amendment equal protection guarantees. This was most recently affirmed by the Supreme Court in *Washington v. Davis*, 426 U.S. 229, 239, 96 S.Ct. 2040, 48 L.Ed.2d 597, 607 (1976), an action brought under Fifth Amendment due process. Justice White said:

> "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. It is also true that the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups. *Bolling v. Sharpe*, 347 U.S. 497, 98 L.Ed. 884, 74 S.Ct. 693, 53 Ohio Ops. 331 (1954)."

See text, *infra* at 14.

Commerce through the Economic Development Administration (EDA) which distributes funds under LPW to State and local governments for public works projects. Grantees are required to contract project construction work to the private sector through competitive bidding (Sections 102-106; 42 U.S.C. 6701-6705). From October 26, 1976, to February 9, 1977, EDA processed, approved and denied applications from State and local governments for assistance under LPW. This period, referred to as "Round I", resulted in the final approval of approximately two thousand projects.

Before EDA had completed the processing of projects under Round I, bills were introduced in the U.S. House of Representatives (H.R. 11, January 11, 1977) and in the U.S. Senate (Senate No. 427, January 25, 1977) to provide additional funding under LPW. The Public Works Employment Act of 1977 (PWE) became law on May 13, 1977, authorizing an additional four billion dollar appropriation for a "Round II" program. By amendment to Section 103, it was provided:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of

the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The Report of the Committee on Public Works and Transportation of the House of Representatives which accompanied the authorization for Round I (Report No. 94-1077, 94th Cong., 2nd Sess., at 2) states that LPW "has a two-fold purpose: (1) to alleviate the problem of nationwide unemployment, and (2) to stimulate the national economy by assisting State and local governments to build badly needed public facilities." Furthermore, Congress made explicit its intent to have the public facilities project funded and commenced quickly, saying:

> "The bill is carefully and expressly designed to avoid the long lag time sometimes associated with public works programs. . . . To be eligible for a grant, the project must be started within 90 days of its approval if federal funds are available. The bill also provides that applications must be acted upon by the administrative agency within 60 days of the date of its receipt." (Id. at 3).

Speedy action by EDA was assured under Section 107 (42 U.S.C. § 6706) which provided:

> "Failure to make such final determination within such period (60 days) shall be deemed to mean approval by the Secretary of the grant requested."

The Section further required that regulations to implement the Act be issued within 30 days of its enactment.

On December 23, 1976, EDA published a list of 1988 projects which had been provisionally selected for funding under Round I (41 Fed.Reg. 56146). By February 9, 1977, final project processing had

been completed, approximately 2,000 were approved, and 23,500 rejected applicants had requested, in the aggregate, approximately 21.8 billion dollars.

The 1977 Amendments effectuated by PWE not only extended the program but were also designed to resolve problems encountered in Round I, *see* Report of the Committee on Public Works and Transportation, U.S. House of Representatives, House Report 95-20, 95th Cong., 1st Sess., at 3 (1977). The Senate version, Report of the Commission on Environment and Public Works, No. 95-38, 95th Cong., 1st Sess., at 2-3 (1977), included changes "in order to target federal assistance more accurately and in the areas of greatest need", stating:

> ". . . (there was) need for the public works program and for increased Federal funding. There was unanimous agreement that the program, properly directed, would be a significant factor in the attack on unemployment. Furthermore, they (the witnesses) noted the lasting contribution that would be made to the economic stability and well-being of communities all over America through their public works projects." (at 2).

The House Report justified the LPW program as follows:

> "Unemployment levels, particularly in the construction industry, remain at unacceptable levels. economic recovery is still weak nationally, exacerbated further by the severe winter with lay-offs and shortages of fuel. The lagging recovery limits the capability of local governments to carry out normal programs of capital expenditure for needed facilities. State and local government outlays for new

construction for the 10-year period since 1967 have actually dropped in volume from $30.8 billion to $22 billion (using 1972 dollars). Continuation of the public works employment program will provide additional stimulus to the sluggish economy." (at 1-2).

PWE was enacted May 13, 1977, and EDA was required to establish and issue regulations and procedures to process (approve or deny) thousands of applications by September 30, 1977, the deadline on the expenditure of the 4 billion dollars appropriated for Round II. Further, to insure speedy implementation of Round II, Section 108(h)(1) (42 U.S.C. 6707(h)(1)) stated that unless otherwise provided, the Secretary was not to consider, or approve, or make a grant for any project on which the application had not been submitted on or before December 23, 1976. Finally, under Section 106(b), grantees were required to commence construction within 90 days of project approval.

The MBE requirement, added to the legislation during the floor debate in the House on February 24, 1977 (123 Cong. Rec. daily ed. at 1441) and later set forth in the Senate (123 Cong. Rec. daily ed. 39...., March 10, 1977), was intended to remedy a deficiency in the 1966 Act whereby "minority businesses received only one per cent of the federal contract dollar despite repeated legislation, executive order and regulations mandating affirmative efforts to include minority contractors in the federal contracts pool." 123 Cong.Rec.S., *supra,* at 3910. Thus, the amendment

was designed to serve a remedial purpose additional to and separate from the primary purpose of reducing unemployment. It was to boost the participation of minority businesses in the grant funds.

The Secretary of Commerce has, in accordance with the authority granted in Section 107, promulgated Regulations (13 C.F.R. 317.19(b)); 42 F.Reg. 27434-27435 (May 27, 1977) under this MBE provision, providing:

> "(b) . . . (1) No grant shall be made under this part for any project unless at least 10 per cent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph 1 of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten per cent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or the supplies intended to be procured."

In addition, on June 6, 1977, the Commerce Department issued Guidelines for Round II (Department Guidelines) in which, in addition to calling for 10% MBE participation, also provided:

> "(b) The applicant/grantee will have the right to request a partial or total waiver of this requirement. This waiver request may be made either at the time of resubmission of the project or subsequent to project approval. The applicant must

provide a statement of justification in support of its request for waiver. This statement must consider the following:

The size of the minority population in the project area;

The availability of minority enterprise in the reasonable trade area from which contractors, subcontractors, and suppliers will be drawn for the project;

The efforts of the grantee and prime contractors have exerted to enlist minority firms; and

Any other relevant facts.

The Regional Director will make the final determination as to whether the waiver will be granted."

In August of 1977, EDA issued a supplemental "*Guidelines for 10% Minority Business Participation in L P W Grants*" (EDA Guidelines) for the implementation of PWE. These EDA Guidelines contemplated that while grantees are primarily responsible for assuring compliance in attempting to locate and involve minority enterprises in the grant project. They require that "every Grantee should make sure that it knows the names, addresses and qualifications of all relevant MBEs", and point out that the Office of Minority Business Enterprises (OMBE) in the Department of Commerce and the Small Business Administration (SBA) are prepared to assist grantees and prime contractors in fulfilling the MBE goals (EDA Guidelines at 4).

In the case of projects to be administered by one prime contractor, "the 10% MBE requirement would be met if the prime contractor is an MBE, or if at least 10% of the grant funds are expended for MBE subcontractors or suppliers". (EDA Guidelines

at 7). Where more than one contractor is involved, "(s)ome of the contractors may themselves be MBEs—for example, contracts for engineering or other professional or supervising services or for landscaping, accounting, or guard services. Some prime contracts may be with MBEs or may contain assurance for 10% MBE participation or for more than 10% MBE participation, with appropriate supporting names and addresses of MBE subcontractors or suppliers. Other prime contracts may provide for less than 10% MBE participation". (EDA Guidelines at 9).

Compliance with the requirements are monitored at the federal level through reporting provisions. The grantee itself must monitor the performance of its prime contractor. If shortfalls occur, EDA can suspend the first letter of credit, or refuse to issue a second letter of credit, or, in extreme cases, terminate the grant unless the grantee demonstrates that the shortfalls are not its fault or the fault of its prime contractor, or unless the grantee can demonstrate that the shortfalls will be made up during the remainder of the contract. (EDA Guidelines at 6-7).

The waiver process is detailed in these EDA Guidelines (at 13-16). If the availability of qualified MBEs is insufficient in the market area as therein defined, waiver may be sought by the grantee on a project-by-project basis from the EDA Regional Director. Although such waiver will ordinarily be entertained only after the grantee and prime contractors have taken all necessary steps to enlist MBEs (i.e., after bidding or negotiation), in exceptional circumstances it may be considered before bidding (EDA Guidelines at 14-15). The grantee must detail efforts to enlist minority

participation and list specific minority businesses contacted and state why they were not used. (EDA Guidelines at 14). The Guidelines define "qualified" as able to "perform the services or supply the materials that are needed" (EDA Guidelines at 3), and grantees and prime contractors should expect to provide technical assistance to MBEs with less experience, to help them obtain bonding, include them in an overall bond or waive bonding where feasible, and to assist them in obtaining working capital. The SBA will provide 90% guarantee for the bond and will provide working capital assistance, so lack of working capital will ordinarily not disqualify a minority business. (EDA Guidelines at 3-4). Finally, the Guidelines express the EDA's policy that it

> "ascribes a high priority to the development and support of minority business enterprises and will enforce the 10% MBE participation strictly." (EDA Guidelines at 1).

II. FACTUAL BACKGROUND.

Pursuant to this scheme, the Pennsylvania Department of Transportation (Penndot) has obtained initial approval for seven local public works grants, totaling over $11,745,000, and the City of Pittsburgh has obtained approval for fifteen grants, totaling almost $9,000,000. At the time of hearing[3] on September

[3]On September 8, 1977, Plaintiff filed the instant action against the implementation of the MBE goals. On September 12, 1977, this Court, after notice and hearing, denied the Plaintiff's request for temporary restraining order and hearing on the request for preliminary injunction was scheduled for September 30, 1977. On September 28, 1977, the Commerce Department moved for summary judgment pursuant to Rule 56, Fed.R.Civ.P., on the basis that the Plaintiff had failed to exhaust the administrative remedies available to it, in that

30, 1977, Penndot had already opened bids on three of the projects (in Mercer, Wyoming and Erie Counties) and had scheduled others to open on October 6th and 27th and sometime in November. The City had advertised bidding on some projects, was about to do so on others, and the bids were scheduled to open at various dates throughout October, beginning October 6th.

On the three projects already let out for bidding by Penndot, four bids were submitted on the Mercer County project, five on the Wyoming County project, and three on the Erie County project. All bids met the 10% MBE requirement and each bidder certified that its minority business participation was bona fide. Six of these bidders were Association Members who identified minority businesses in their bids, and no bidder has requested the Commonwealth to seek a waiver of the 10% provision. Nor has the City received such a request.[4]

The Association Members, primarily involved in heavy and highway construction, do a substantial portion of Penndot's and the City's heavy and highway business in the 33 county area which they represent. (See Footnote 1). In performing heavy and highway construction, a prime contractor typically subcontracts about 13.7%

it had failed to request the Defendant Grantees to seek waivers on its member's behalf, and that the Plaintiff lacked standing to bring this action.

[4]On March 11, 1977, representatives of the Plaintiff attended a pre-bid meeting called by the City to acquaint potential contractors with the Round II bidding requirements. Subsequent thereto, none of the Association Members contacted available referral services such as OMBE or SBA, nor requested the City to seek waivers on their behalf. Nor did the City seek waivers. The Commonwealth has stated in its grant application that waivers may be necessary for certain projects.

of the work (the percentage will be higher if a major part of the project involves bridge construction, but on some types of contracts the contractor may not subcontract any of the work), and about 30% of the bid involves the purchase of materials for the job.

All four prime bidders on Penndot's Mercer County project (a concrete bridge construction) were Association Members. Brayman Construction, also an Association Member, was a subcontractor responsible for $166,000 of the over $400,000 of the apparent low bid of Bracken Construction. Because only $156,000 of the project was funded by LPW funds, the minority set-aside was $15,600. Bracken, the prime contractor, had negotiated with Brayman for the subcontract bid and asked Brayman to take care of the 10% set-aside. Brayman then contracted with R.L. Johnson Corporation, a minority business, for $16,000 to place reinforced steel on the bridge, work which Brayman would otherwise have done itself.

The apparent low bidder in Erie County was a non-Association Member who submitted a bid about $29,600 below the second place Association Member. No contracts have yet been finally approved by the EDA and officially awarded to the low bidders.

III. THE EXHAUSTION OF ADMINISTRATIVE REMEDIES.

The Secretary of Commerce, the Commonwealth and the City urge that this action is barred because neither the Plaintiff nor its members have exhausted their administrative remedies. At first glance this argument has considerable cogency for the Court is well aware that "no one is entitled to judicial relief for a supposed

or threatened injury until the prescribed administrative remedy has been exhausted." *Meyers v. Bethlehem Shipbuilding Corporation,* 303 U.S. 41, 50-51, 58 S.Ct. 459, 82 L.Ed. 638, 644 (1938). And in the Administrative Procedure Act (5 U.S.C. § 704), Congress mandates that, except as otherwise provided by statute, only "final agency action" is subject to judicial review.

However, an examination of the Complaint and proofs in this case show that it is not the operation of the Administrative Regulations and Guidelines that is being challenged, except insofar as they flow from an allegedly unconstitutional statutory classification on the basis of race and national origin. The Regulations do factually frame the basic constitutional problem, but the Plaintiff does not base its case on the arbitrariness of the Administrative Guidelines. Rather the Association contends the MBE requirement of PWE is unconstitutional since *it* imposes quotas and invidiously classifies on the basis of race and national origin.

The exhaustion principle is carefully defined by the Supreme Court in *Public Utilities Commission of California v. United States,* 355 U.S. 534, 78 S.Ct. 446, 2 L.Ed.2d 470 (1958). There, the California statute required prior approval by the State Public Utilities Commission for the continuation of a longstanding practice, sanctioned under federal law, of negotiating with common carriers for special rates for the shipment of government property within the United States. When the United States sued for a declaration that this law was unconstitutional, the State countered that the Government had failed to exhaust its administrative remedies. The Court held that the constitutionality problem was one that the administrative agency could not be expected to entertain, saying:

"If . . . an administrative proceeding might leave no remnant of the constitutional question, the administrative remedy plainly should be pursued. But where the only question is whether it is constitutional to fasten the administrative procedures onto the litigant, the administrative agency may be defied and judicial relief sought as the only effective way of protecting the asserted constitutional right." (355 U.S. at 539-40).

Counsel for the Plaintiff correctly point out that significant limitations on the exhaustion doctrine have recently been recognized. *See Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); *Weinberger v. Salfi,* 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); *Johnson v. Robison,* 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974). In this case, the success or non-success of obtaining an administrative waiver is inconclusive of the constitutional question. There are no factual determinations which the EDA could make concerning the availability of a waiver which would clarify or eliminate the need to resolve the constitutional issue, or which would remedy the alleged basic constitutional flaw in the Act. The PWE compels contractors, grantees, and the Secretary to racially and ethnically classify business enterprises for the distribution of funds and granting of waivers. As in *Public Utilities Commission, supra,* the Plaintiff here challenges this statutory directive which requires them to seek administrative relief, if available, from an alleged unconstitutional burden. The EDA cannot be expected to rule the Act under which it is functioning is unconstitutional, nor would it have the power to do so if it were so inclined. Nor can the Administrator grant a waiver for any reason other

than the unavailability of qualified MBEs. It is clear that Congress inserted the MBE provision, not to give the EDA discretion to fashion its own scheme for distributing the grants, but only to provide for EDA discretion to exempt those areas where insufficient MBEs operate to meet the 10% goal.[5] There is no administrative remedy intended for the non-minority contractor who has been, or will be, deprived of his contractual rights where MBEs are available. As the EDA is without power to decide the constitutional issue or to eliminate its factual basis,[6] this Court's exercise of jurisdiction would present no threat to administrative autonomy, nor would it interfere with any fact-finding process which would abrogate the need to resolve the constitutional issue before the Court.

Furthermore, the Court has serious doubt that the exhaustion doctrine could bar the Plaintiff here in any event. The EDA Guidelines, page 14, specifically

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[5]One could, for example pose the possibility that exhaustion of the administrative process here could leave no remnant of the constitutional question because the Secretary might conclude that its waiver requirement is unconstitutional, rescind its own regulations and guidelines, and allow exception from the 10% provision upon request. Or, under its authority and discretion, it could decide not to issue grants where non-minority businesses would be adversely affected. In either case, the Secretary's action would fly in the face of its own regulations and clear statutory intent. The phrase in the statute "except to the extent the Secretary determines otherwise" was intended to permit the Secretary to provide waivers for areas where no minority businesses were available. See Cong.Rec.H., *supra* at 438-39. To ignore the 10% requirement for other reasons would be counter to the statutory directive. Therefore, the waiver process is an integral part of the statutory purpose and Plaintiff's members are injured by having to utilize it. No reasonable possibility exists, then, which would eliminate by agency action the need to resolve the constitutional question.

[6]See text, *infra* at 12, for disruption caused in pre-bid and bidding stages before a waiver may be sought and whether or not a waiver is eventually granted.

provide, in accordance with the Secretary's Regulations, that "(o)nly a Grantee can request a waiver" from the EDA. If either the Commonwealth or the City decide not to seek a waiver, and none have been sought to date, the Association has no available administrative remedy which it would be required to exhaust. Nor does any administrative procedure exist which requires contractors to request the Commonwealth or the City to seek a waiver. The Association's only recourse, then, is in the Courts.

IV. THE STANDING ISSUE.

The Defendants contend the Plaintiff lacks standing to raise the constitutional issue in the absence of allegation and proof that Plaintiff's members have bid on PWE funded contracts, have sought waivers on any such contracts, have unreasonably been denied waivers, or have had responsive bids rejected because of the application of the MBE provisions. The Plaintiff, to the contrary, alleges that bids are presently being accepted and contracts are about to be awarded which put the Association Members in present jeopardy. The proof is that prime contractors are looking for MBEs to take the 10% which must be given them, and under the time schedules the future business of the Association Members is already in danger.

In *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), the Court stated the law with respect to associational standing as follows:

> "The association must allege that its members, or any of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable suit.

> . . . So long as this can be established, and so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." (422 U.S. at 511, Citation omitted).

It would appear to the Court that the Association members are suffering "distinct and palpable" competitive injury which is recognized as sufficient in and of itself to invoke the Court's power. *See Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); *National Motor Freight Assn. v. United States,* 372 U.S. 246, 83 S.Ct. 688, 9 L.Ed.2d 709 (1963); *NAACP v Button,* 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). To meet this 10% set-aside, Brayman Construction, an Association member and successful bidder on the Mercer County Penndot project, has already contracted out work it normally would have performed itself. Other member general contractors, in the bids already submitted and in preparation for those about to be let, are forced to seek out subcontractors and materials suppliers on the basis of the statutory minority classifications and to add race as at least one, if not the primary factor in the complexity of considerations involved in that business judgment, thus disrupting the balance of other factors contractors normally weigh. It also operates to the detriment of non-minority subcontractors and suppliers seeking business with prime contractors. Whether race was *the* factor in their losing the business with the general contractor is not a necessary determination to find injury if the racial classification was an

unconstitutional limitation on their ability to compete for the business. In the bidding that has occurred, all bidders met the 10% provision, so under the Secretary's regulations and guidelines, no waiver may be granted, and these injuries are not reversible without court action.

Finally, the award of three Penndot contracts is imminent and since the minority business requirements were met by the bidders, a waiver cannot be granted under the Regulations. Approval is therefore more than a hypothetical possibility, rather it is a virtual reality, and the grants will have been awarded in a race-conscious manner to the detriment of non-minority businesses which are harmed in their ability to compete for the contracts. These injuries are more concrete and direct than the tenuous harm claimed by the Homeowners Association in *Warth v. Seldin, supra,* where the plaintiff could show no direct connection between the challenged zoning provision and the inability to find housing. The effects of this provision on the Association Members here are real and sufficient to assure a concrete controversy and aggressive presentation of the constitutional question, and the Association therefore has standing to sue to protect the interests of its Members.

V. LACHES.

The City also contends that the Plaintiff is guilty of laches for delaying the bringing of suit after knowing of the alleged deprivations of its rights. The short answer to this contention is that while there are no certain periods within which a plaintiff may reasonably delay before filing suit (*Clark v. Volpe,* 342 F.Supp. 1324, *aff'd per curiam* 461 F.2d 1226 (5th Cir. 1972);

Fruit Industries v. Bisceglia Bros. Corp., 101 F.2d 752, 754 (3rd Cir. 1939)), the Court cannot conceive that it can be argued seriously that the delay of one month, from August 11, 1977, could be construed, under the circumstances of this case, to be unreasonable.

In light of the above dispositions, we now must proceed to the constitutional argument of the Plaintiff, strenuously resisted both by the Secretary of Commerce and the Commonwealth, and on which the City is taking no position.

VI. THE CONSTITUTIONAL ISSUE.

A. The Applicable Standard

The Association claims that the PWE 10% MBE requirement creates an absolute racial and ethnic quota which invidiously discriminates against its members in violation of their Fifth Amendment rights. While the Fifth Amendment contains no equal protection clause, the precepts of equal protection have been read therein as co-extensive with those under the Fourteenth Amendment. *Washington v. Davis,* note 2, *supra; Johnson v. Robison, supra; Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973); *Richardson v. Belcher,* 404 U.S. 78, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971); *Schneider v. Rusk,* 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964). Under either Amendment, racial classifications are constitutionally "suspect", and, as the Supreme Court stated in *Loving v. Virginia,* 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010, 1017 (1967),

> "(a)t the very least, the Equal Protection Clause demands that racial classifications . . . be subjected

> to the 'most rigid scrutiny' . . . and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial determination which was the object of the Fourteenth Amendment to eliminate."

This "strict scrutiny" standard[7] requires (1) that the governmental objective must serve "a compelling state interest", *Shapiro v. Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); *McLaughlin v. Florida,* 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), and (2) that the means of accomplishing the objective be necessary and the least discriminatory means available. *Loving v. Virginia, supra; Dunn v. Blumstein,* 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Shelton v. Tucker,* 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960). The question arises, then, as to whether this "strict scrutiny" is also mandated when race is used for remedial purposes.

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[7]Strict scrutiny may also be mandated when a fundamental right is violated. However, Plaintiff has no fundamental constitutional right here. In *Germann v. Kipp,* 429 F.Supp. 1323, 1333-4 (W.D.Mo. 1977), a case involving discrimination in public employment, the Court concluded:

> "We begin with the basic that no person possesses a constitutional right to public employment. *NAACP v. Allen, supra,* 493 F.2d at .....; *Bridgeport Guardians, Inc. v. Bridgeport Civil Service Comm'n.,* ..... F.2d 1333, 1337 (2d Cir. 1973); *see San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 29-34, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) ('It is not the province of this court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws.' Id. at 33, 93 S.Ct. at 1297). Thus, operation of the City's affirmative action plan denies no one any specific right conferred by the Constitution."

Likewise, here there is no such fundamental right to public works funds.

The Defendant Secretary of Commerce and the Commonwealth point out that race has been used in a variety of remedial contexts. Congress has a special responsibility for interpreting and enforcing the Civil Rights Amendments to the Constitution, *see South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), and has in the past authorized expenditures for such measures, the most recent of which is the Public Works Employment Act here under consideration. They also enumerate the many minority-sensitive programs of the federal government, *e.g.*, plans under Executive Order 11246 (30 Fed.Reg.12319, as amended 32 Fed.Reg.14303) require federal contractors to take affirmative action to prevent disproportionately low employment of women and minorities in their work force, the constitutionality of which have been repeatedly upheld. *Contractors Ass'n of Eastern Pa. v. Secretary of Labor,* 442 F.2d 159 (3rd Cir.), *cert. denied* 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971); *Rossetti Contracting Co. v. Brennan,* 508 F.2d 1039 (7th Cir. 1974); *Northeast Construction Co. v. Romney,* 485 F.2d 752 (D.C.Cir. 1973); *See The Philadelphia Plan: A Study in the Dynamics of Executive Power,* 39 U. of Chicago Law Rev. 732 (1972). In particular, they refer to the series of federal programs designed to aid minority businesses. See note 8 *infra.* Additionally, race may be considered in devising remedies for private discrimination, *International Brotherhood of Teamsters v. United States,* ..... U.S. ....., 97 S.Ct. ....., 52 L.Ed.2d 396 (1977); in reapportionment of voting districts, to protect rights of certain minority groups, *United Jewish Organizations v. Carey,* 430 U.S. 144, 51 L.Ed.2d 229 (1977); *Georgia v. United States,* 411 U.S. 526, 93 S.Ct.

1702, 36 L.Ed.2d 472 (1973); in the implementation of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); and in school desegregation, *North Carolina Bd. of Education v. Swann*, 402 U.S. 43, 91 S.Ct. 1284, 28 L.Ed.2d 586 (1971). In *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), racial criteria were permitted to counteract a test which appeared to screen out black applicants for employment at a disproportionately high rate. (*See Germann v. Kipp*, 429 F.Supp. 1323 (W.D.Mo. 1977); and *Associated General Contractors v. San Francisco*, 431 F.Supp. 854 (N.D.Cal. 1977) for general discussion of these cases.)

In *Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra*, the Philadelphia Plan required bidders on any federal or federally assisted construction contract for projects in a five county area around Philadelphia to submit acceptable affirmative action programs which included specific goals within a specified range for utilization of manpower in certain skilled crafts. Circuit Judge Gibbons, speaking for the court, made the following succinct statement (442 F.2d 159, at 176-7)

> "Finally, the plaintiffs urge that the specific goals specified by the Plan are racial quotas as prohibited by the equal protection aspect of the Fifth Amendment. *See Shapiro v. Thompson*, 394 U.S. 618, 641-42, 89 S.Ct. 1322, 22 L.Ed. 600 (1960); *Schneider v. Rusk*, 377 U.S. 163, 84 S.Ct. 1187, 12 L.Ed.2d 218 (1964); *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954). The Philadelphia Plan is valid Executive action designed to remedy the perceived evil

> that minority tradesmen have not been included in the labor pool available for the performance of construction projects in which the federal government has a cost and performance interest. The Fifth Amendment does not prohibit such action."

And in *Associated General Contractors of Mass., Inc. v. Altshuler*, 490 F.2d 9 (1st Cir. 1973), *cert. denied* 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974), the court was required to construe certain contract requirements imposed by the Commonwealth of Massachusetts upon contractors engaged in publicly funded construction work. There was a requirement that the contractor "maintain on his project, which is located in an area in which there are high concentrations of minority group persons, a not less than twenty percent ratio of minority employee man hours to total employee man hours in each job category". The contract also required the contractor to engage in special referral procedures, to cooperate with the liaison committee composed of various representatives from community groups, to make weekly compliance reports to the liaison committee and to the Massachusetts Commission Against Discrimination, and to permit the Committee access to the books, records and accounts containing employment information. Chief Judge Coffin made the following statement (490 F.2d at 16-17):

> "The first Justice Harlan's much quoted observation that 'the Constitution (is colorblind) . . . (and) does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights', *Plessy v. Ferguson*, 163 U.S. 537, 554, 16 S.Ct. 1138, 1145, 41 L.Ed. 256 (1896) (dissenting opinion)

has come to represent a long-term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities.

Intentional, official recognition of race has been found necessary to achieve fair and equal opportunity in the selection of grand juries, *Brooks v. Beto,* 336 F.2d 1 (5th Cir. 1966); tenants for public housing, *Otero v. New York City Housing Authority,* 484 F.2d 1122 (2d Cir. 1973); *Norwalk CORE v. Norwalk Redevelopment Agency,* 395 F.2d 920 (2d Cir. 1968); *Gauteaux v. Chicago Housing Authority,* 304 F.Supp. 736 (N.D. Ill. 1969); school administrators, *Porcelli v. Titus,* 431 F.2d 1254 (3d Cir. 1970); and children who are to attend a specific public school, *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

The intentional, official recognition of race in the selection of union members or construction workers has been constitutionally tested and upheld in two contexts. The first is where courts have ordered, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g), remedial action for past discrimination. In fulfilling their 'duty to render a decree which will so far as possible

eliminate the discriminatory effects of the past . . .', *Louisiana v. United States,* 380 U.S. 145, 154, 85 S. Ct. 817, 822, 13 L.Ed.2d 709 (1965), courts have ordered unions to grant immediate membership to a number of minority applicants, *United States v. Wood, Wire, and Metal Lathers International Union, Local No. 46,* 471 F.2d 408 (2d Cir. 1973), *cert. denied,* 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973); to begin an affirmative minority recruitment program, *United States v. Sheet Metal Workers International Ass'n, Local No. 36,* 416 F.2d 123 (8th Cir. 1969); to match normal referrals with minority referrals until a specific objective has been obtained, *Heat and Frost Workers, Local 53 v. Vogler,* 407 F.2d 1047 (5th Cir. 1969); or to take on a certain number of minority apprentices for each class of workers, *United States v. Ironworkers Local 86,* 443 F.2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971). Courts have also ordered employers to hire minority employees up to thirty per cent of the total work force, *Stamps v. Detroit Edison,* 365 F.Supp. 87 (E.D.Mich. 1973); to hire one minority worker every time two white workers were hired, up to a certain number, *Carter v. Gallegher,* 452 F.2d 315 (8th Cir. 1971), *cert. denied* 406 U.S. 950, 92 S.Ct. 2045, 32 L.Ed.2d 338 (1972); and in our own *Castro v. Beecher,* 459 F.2d 725 (1972), we order that black and Spanish-speaking applicants for police positions, who had failed to measure up to a constitutionally impermissible set of hiring standards, be given priority in future hiring.

The second context in which race has been recognized as a permissible criterion for employment is where courts have upheld federal affirmative action programs against challenges under the Equal Protection clause or under the anti-preference provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2003-2(j). Recognizing that the discretionary power of public authorities to remedy past discrimination is even broader than that of the judicial branch, *see Swann v. Charlotte-Mecklenburg, supra* at 16 of 402 U.S., 91 S.Ct. 1267; *cf. Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966), courts have upheld the specific percentage goals and time tables for minority hiring found in the Philadelphia Plan, *Contractors Ass'n of Eastern Pennsylvania v. Secretary of Labor,* 311 F.Supp. 1003 (E.D.Pa. 1970), *aff'd,* 442 F.2d 159 (3d Cir. 1971), *cert. denied,* 404 U.S. 854, 92 S.Ct. 98, 30 L.Ed.2d 95 (1971), the Cleveland Plan, *Weiner v. Cuyahoga Community College District,* 19 Ohio St. 2d 35, 249 N.E.2d 907, 908 (1969), *cert. denied,* 396 U.S. 1004 (1970), the Newark Plan, *Joyce v. McCrane,* 320 F.Supp. 1284 (D.N.J. 1970), and the Illinois Ogilvie Plan, *Southern Illinois Builders Ass'n v. Ogilvie,* 327 F.Supp. 1154 (S.D.Ill. 1971), *aff'd,* 471 F.2d 680 (7th Cir. 1972)."

The frequent use of race for remedial purposes, however, does not reduce the need for close scrutinization of its use. Nor do the above cited cases stand for the principle that "benign" racial discrimination is always constitutionally permissible. Although a consistent standard is difficult to discern from existing case law,

in each case, a judicial, executive or congressional finding of past discrimination preceded the race-conscious remedy. In *Associated General Contractors of Massachusetts, supra,* Judge Coffin concluded that racial classification could be constitutionally condoned "only where a compelling need for remedial action can be shown", 490 F.2d at 17, and "the means chosen to implement the compelling interest should be reasonably related to the desired end." *Id.* at 18. Finding both that the need to remedy the serious racial imbalance in the construction trades and that the means under consideration were reasonably related to that end, Judge Coffin further concluded that a program which included unrealistic minority hiring goals might impose an unreasonable burden on the employer and upon qualified workers who were denied jobs because they were not members of the racial minority, and therefore a fair procedure for contractors must include "the necessary element of procedural due process" for "(s)o long as contractors receive notice and a meaningful opportunity to challenge any allegations of non-compliance and prove that they have taken whatever efforts are required of them to comply, it is less important that a particular percentage goal might be slightly optimistic or unrealistic, given current availability of qualified minority workers." *Id.* at 19.

The Court is well aware that extreme caution is necessary when race is used for purportedly benign purposes, for, as Justice Brennan stated in *United Jewish Organizations, supra,* 51 L.Ed.2d at 251, "the considerations that historically led us (the Court) to treat race as a constitutionally 'suspect' method of classifying individuals are not entirely vitiated in a preferential context." The dangers of determining rights

and distributing benefits by racial categorization are, in fact, substantial. *See Associated General Contractors of Massachusetts, supra* at 17-18. A purportedly benign classification could conceal an invidious purpose. Or, the classification may actually be detrimental to the interests of the "preferred" minority, *United Jewish Organizations, supra,* 51 L.Ed.2d at 250-52. (Brennan, J. concurring), if not when implemented, at some point in the future. Stigmatization of the preferred minority group could frustrate the achievement of minority individuals by perpetuating misconceptions about race, intelligence, and ability. Some also argue that reducing competitive standards to compensate inabilities to compete caused by past discrimination will actually discourage minorities from improving and eventually being able to compete on an equal basis. Finally, benign discrimination may, as claimed here, have adverse consequences on non-minority individuals and therefore be perceived as unfair. *Id.*

So the dangers of race discrimination are significant, even if for purportedly remedial purposes. But they do not, and they have not, compelled the conclusion that such classifications for remedial purposes are unconstitutional. What they do compel, however, is that the decisionmaker carefully scrutinize both the purpose of the statute and the means used. *Associated General Contractors of Massachusetts v. Altschuler, supra* at 17.

Thus, racial categorization remains suspect even in a benign cloak, and more than a rational basis is needed to constitutionally justify the legislation. *Associated General Contractors of Massachusetts, supra* at 17. *See Oburn v. Shapp,* 521 F.3d 142, 149-50 (3rd Cir. 1975). *But see Germann v. Kipp, supra,* 1335-

8. To withstand constitutional scrutiny, the governmental purpose must be compelling. In addition, we conclude that the dangers of any racial classification require that the means used be necessary. *See Oburn v. Shapp, supra,* at 149-50 & n.20. To be necessary, the means to be implemented must have a logical nexus to the compelling objective and must sufficiently reduce the dangers of such classification so that no less onerous alternatives are reasonably available. Finally, the statute must afford procedural due process by giving notice and reasonable opportunity to comply.

B. Application of the Constitutional Standard

1. Compelling governmental interest.

If the legislative classification is intended to remedy the adverse effects of present or past discrimination, and not as an invidious discrimination against any racial or ethnic group, and the need for such remedial relief can be shown to be compelling, then the statute is serving a compelling state interest. *Associated General Contractors of Massachusetts, supra* at 17. This Court has no doubt that this 10% MBE provision was intended to attack a serious economic problem and not as a discrimination against any race. Although the focus of the PWE is to channel funds quickly into local construction markets to reduce unemployment and improve local facilities, the 10% MBE provision was intended to serve an additional purpose: to remedy a deficiency in the 1976 Act which did nothing to enable minority business enterprises, competitively disadvantaged by past and present discrimination, to compete successfully for grant funds. Representative Mitchell introduced the amendment, identifying the compelling need for such remedial action since minority business

enterprises were receiving only 1% of government contracts (123 Cong.Rec.H., *supra* at 1436-37). The amendment is closely related to an overall federal scheme to assist minority business enterprises which have traditionally been excluded from industry.[8] Agency and census reports support this conclusion that remedial relief is a compelling need. Despite a minority population of about 17%, minority individuals control only about 4% of the businesses in the United States, and minority businesses account for less than 1% of

[8]This federal scheme includes the following:

In March 1969, President Nixon issued Executive Order 11458, which sets forth a national policy of fostering minority business ownership and development. This Order led to establishment of the OMBE in the Department of Commerce to provide business assistance services to prospective or existing minority entrepreneurs. OMBE operates through a network of approximately 270 minority business development organizations which in fiscal 1975 served over 33,000 clients. OMBE's annual budget is in excess of $50 million.

In October 1971, Executive Order 11454 was superseded by Executive Order 11625, which requires all federal agencies to increase their efforts toward promoting minority business enterprise. 36 F.Reg. 199.

The SBA administers a variety of assistance programs aimed primarily at economically disadvantaged and minority entrepreneurs. Such programs include the Economic Opportunity Loan Program, which in fiscal 1974 made over 6,000 loans totaling more than $100 million; and the Minority Enterprise Small Business Investment Company Program (MESBIC), through which minority firms are provided venture and long-term capital, guaranteed loans, and management and technical assistance. SBA estimates that more than 1,500 minority businesses have received assistance through the MESBIC program.

One of the most well-known SBA activities in this area is the so-called 8(a) program (15 U.S.C. § 637), through which the agency assists minority and disadvantaged persons in obtaining non-competitive federal contracts. Through fiscal 1975, over $1 billion in sub-contracts were awarded to target firms under this program.

Pursuant to 41 C.F.R. 1-1.1310, every federal agency is charged with establishing a minority procurement program to provide assistance to minority firms. All procurements in excess of $5,000 are required to include a statement requiring the contractor to use his "best efforts" to provide sub-contracting opportunities to MBEs. On Procurements in excess of

national gross business receipts and total business assets. (Interagency Report on the Federal Business Development Programs, March 1974, at 24: Minority Business Opportunity Committee Handbook, August 1976, at I-1). And it has been estimated that minority businesses obtain less than 1% of government contracts. (Minorities and Women as Government Contractors, U. S. Commission on Civil Rights Report, May 1975, at 2, 86 and 89).

The Minority Business Opportunity Committee Handbook, *supra*, after identifying the need for assistance in obtaining access to business opportunities, capital, profitable markets, loans and equity funding, and education and training, states at I-1-2:

> "The severe shortage of potential minority entrepreneurs with general business management skills is a result of their historic exclusion from the mainstream economy. . . .
>
> A related problem is the presence of commonly held assumptions and beliefs within the entire community concerning the business capabilities of minority people."

Likewise, the House Committee on Small Business reported on the minority business problem:

> "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present,

$500,000, prime contractors are required to develop an affirmative action plan to insure fair consideration of MBE subcontractors.

In 1972 OMBE established the National Purchasing Council to increase procurements by private businesses from minority firms. The Council has set a goal of generating $1 billion in private sector sales for fiscal 1977. (Brief of the Secretary, at 29-30.)

this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular. However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them." (Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, at 182-83 (November 1976).)

Thus, Congress has recognized that this inability of minority businesses is a direct result of past, and to a lesser extent, present discrimination.

While the lack of legislative history to support the purpose of the statute is troublesome, the Court cannot say that the statute is so crude that we cannot discern its remedial purpose. *See United Jewish Organizations, supra,* 51 L.Ed.2d at 251 (Brennan J. concurring). The minorities listed in the MBE definition are among those historically discriminated against in our society and were among those considered as minorities for purposes of the government reports on minority businesses.[9] The Court concludes that the 10% minority

[9]The Office of Minority Business Enterprises defines "minority business enterprise" as:

" 'Minority business enterprise' means a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Such disadvantage may arise from cultural, racial, chronic economic circumstances or background or other similar cause. Such persons include, but are not limited to, Negroes, Puerto Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts." (Executive Order No. 11625, October 13, 1971, 36 Fed.Reg. 19967).

business provision was enacted pursuant to a compelling governmental interest of remedying the past and present effects of discrimination endured by minority business enterprises.

2. Necessary in terms of the least discriminatory means.

A troublesome question is whether the means here used to accomplish the remedial objective is warranted. Plaintiff argues that the PWE creates an absolute racial "quota" which is constitutionally impermissible. The Secretary of Commerce and the Commonwealth define the 10% requirement as a "goal" which may be waived if unobtainable. The characterization of the provision as a "quota" or a "goal", however, is not helpful to a determination of the constitutional question. Quotas, as well as goals, have been utilized in various contexts and have been judicially condoned. *See Oburn v. Shapp, supra,* and cases cited therein at n. 20; *Associated General Contractors of Massachusetts, supra,* and cases cited therein; *Contractors Association of Eastern Pennsylvania, supra; Carter v. Gallagher,* 542 F.2d 315 (8th Cir.), *modified on rehearing,* 542 F.2d 327 (1971), *cert. denied* 406 U.S. 950 (1972); *Erie Human Relations Commission v. Tullio,* 360 F.Supp. 628 (W.D.Pa. 1973), aff'd 493 F.2d 371 (3rd Cir. 1974). The question for constitutional scrutiny is whether the means used by the Legislature in this statute for MBEs is a necessary one under the circumstances.

The Amendment was introduced because existing programs which had utilized alternative approaches had not succeeded in raising minority business participation in government contracts above 1%. 123 Cong.Rec.H., *supra*. These programs to provide minority businesses with capital and technical assistance have therefore not entirely eliminated the competitive barriers for minority firms, and the "inroads" referred to by the House Committee on Small Business are not enough. Indeed, the 1% minority business participation in government contracts estimated in 1976, see text *supra* at 21, is not substantially different from 1972 figures on gross construction industry receipts by minority firms (1972 Census of Construction Industries, Table A.1; 1972 Survey of Minority-Owned Business Enterprises, Table 5), suggesting that the ability of minority businesses to compete in the construction industry has not significantly increased. Moreover, capital and technical assistance programs do nothing to overcome barriers existing due to lack of confidence in minority business ability or racial prejudice and misconceptions.

Some other mechanism is therefore needed to guarantee participation by available and qualified minority businesses to give them a foothold in the competitive market. The 1% level which alternative programs have been unable to increase, at least in the short run, will not afford the opportunities to develop the experience, skills and reputation looked for in a competitive market. A percentage set-aside is the only effective way to crack the competitive barriers and end the cycle which continually excludes minority businesses from proportionate participation. This MBE provision will afford minority businesses this heretofore lacking opportunity to acquire experience, establish a reputation

and rebut misconceptions about minority business capability.[10]

Given the need for some kind of set-aside to overcome the barriers built by racial discrimination, inclusion of a 10% set-aside in the PWE reduces many of the dangers inherent in even benign racial classifications and is a reasonable approach. Its inclusion in the Act, which is aimed at the construction industry, has a direct nexus to increasing participation by minority contractors in government contracts and providing experience for competition in other markets. Also, the 10% figure is a reasonable one. Although the minority population is about 17%, the 10% figure is justifiably below that percentage, given their 1% past participation in the construction industry, and is not a concealed limitation on them. Since the program is short-term, there is no danger that the 10% requirement would become in practice a limitation of 10% once minority businesses have become established and competitive. On the other hand, the 10% requirement applies only to the extent local projects are funded by grants under PWE and is not overly intrusive on non-minorities. It is not a requirement that projects receiving federal funds assure that 10% of the *project* funds be given to minority businesses. Nor does it attempt to create

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[10]Racial classification is the only workable way to create this set-aside. A more generalized classification such as "disadvantaged businesses" would be more difficult to apply efficiently and would not focus only on those businesses suffering because of past discrimination. Such overinclusiveness in the preferred class would be even more detrimental to the non-preferred majority than the present classification. While some minorities may argue they have been capriciously excluded from the preferred class, this is not the injury claimed by the Association, and the Court is not willing to say that Congress cannot focus on those groups it finds to be most grievously affected, even though others have also been affected.

an overall 10% requirement for the construction industry as a whole. These public works funds are intended to boost the construction industry by channeling extra funds into one aspect of the industry. A set-aside of 10% of these remedial funds for an additional remedial purpose is not unreasonable, especially given the availability of a waiver to the extent the 10% objective is unobtainable. See text *infra* at 25.

One very important restraint on the 10% provision in the PWE is the termination date of December 31, 1978 for appropriation of funds (selection of projects ended September 30, 1977). Thus, no affirmative decision is needed to terminate the set-aside, and there is no danger that the 10% figure will become an entrenched entitlement for minority businesses. To the contrary, if the Act is extended beyond the termination date, for a similar 10% provision to be constitutionally permissible there must be *at that time* a demonstrably compelling need for remedial relief. This decision can be based on measurable statistics on minority participation and the success of other programs, and is not merely a subjective determination. In addition, because the 10% requirement is so short-term and covers only public works projects to the extent of the federal funding, minority businesses are encouraged to develop their own capital, expertise and reputation to survive in the competitive market.

The provision also has built in a waiver of the 10% requirement where no qualified minority businesses are available. Although the statute itself contains only the phrase "except to the extent the Secretary determines otherwise", the House debate reveals that this phrase was included specifically to assure that

waivers be granted in areas where qualified minority businesses do not exist to perform the necessary work. 123 Cong.Rec.H, *supra* at 1437-41. PWE therefore does not create an impossible burden to obtain the funds. Grantees and contractors were also given reasonable notice of the requirement so that they could comply.

Finally, the dangers of adverse stigmatization of the minority businesses is not as significant in this context as in some others. The competitive preference carries no negative connotation as to innate intelligence or other innate qualities of minority individuals, but refers specifically to business skills, capital, experience and opportunity. As previously noted, it actually provides minority business operators the chance to rebut misconceptions about their ability once given the proper training, technical assistance and the opportunity, and to establish a reputation upon which they can become effective competitors.

VII. CONTRADICTORY STATUTES.

The Association further argues that the Act violates due process because it requires its Members to violate antidiscrimination provisions within the same statute and in other federal statutes. *See* 42 U.S.C. §§ 6727, 1981, 1983 and 1985. The 10% MBE provision and the antidiscrimination statutes have a common objective, to assure equality of opportunity and to remedy the lingering effects of discrimination. The Court is not convinced that using race as a factor in awarding subcontracts, when done without discriminatory intent and solely to comply with a legitimate federal remedial program and under the direction of State and local governments, creates such a statutory conflict.

Briefly restated, there is no inherent inconsistency between a requirement that contracting be done without discriminatory consideration of race and a requirement that every good faith effort be used to achieve minority participation pursuant to Legislative mandate in grant funds. *See Contractors Ass'n of Eastern Pa. v. Secretary of Labor, supra.*

VIII. SUMMARY.

The Court concludes that the 10% minority business enterprises provision as a Legislative mandate on public works funding does not violate the Constitutional rights of Association Members. We have applied a strict scrutiny standard and have found a compelling State interest that is served and that the provision is necessary to accomplish non-invidious ends.

The United States Constitution does not preclude affirmative action when a compelling need to which it is targeted contains no invidious discriminatory intent and the legislation contains sufficient restraints to reduce dangers inherent in even benign racial classifications. We do not here decide broad, sweeping principles of reverse discrimination, but hold only that in the area of a public works appropriation bill, limited of necessity in duration and scope, there is nothing constitutionally impermissible in requiring reasonable percentage minority business enterprise participation.

This Court takes no position on the wisdom of Congress' inclusion of the MBE provision in the Public Works Employment Act, for that is a legislative, not a judicial, decision. The Court concludes here only that this legislation withstands the Constitutional attacks made on it, and the request for preliminary injunction will be denied.

The foregoing constitutes the Courts Findings of Fact and Conclusions of Law. An appropriate Order will be entered.

/s/ Daniel J. Snyder, Jr.
UNITED STATES DISTRICT JUDGE

Dated: October 13, 1977.

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Order of Court.

In the United States District Court for the Western District of Pennsylvania.

Constructors Association of Western Pennsylvania, Plaintiff v. Juanita Kreps, Secretary of Commerce of the United States of America; Milton J. Shapp, Governor of the Commonwealth of Pennsylvania; and Richard Caliguiri, Mayor of the City of Pittsburgh, Defendants. Civil Action No. 77-1035.

AND NOW, to-wit, this 13th day of October, 1977, after hearing and due consideration of the arguments and briefs of the parties, and for the reasons set forth in the Opinion filed herewith,

IT IS ORDERED, ADJUDGED AND DECREED that the Request of the Plaintiff, Constructors Association of Western Pennsylvania, for a preliminary injunction against the Defendants be and the same is hereby denied.

/s/ Daniel J. Snyder, Jr.
UNITED STATES DISTRICT JUDGE

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